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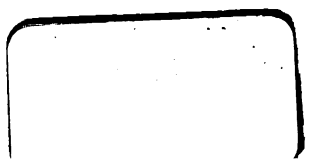
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# IRISH COMMON LAW REPORTS.

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## REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

EXCHEQUER,

EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1856 AND 1857.

*Queen's Bench;*

BY JOHN S. ARMSTRONG, ESQ. AND W. H. FALLOON, ESQ.

*Common Pleas;*

BY LESLIE S. MONTGOMERY, ESQ.

AND B. L. FLEMING, ESQ.

*Exchequer;*

BY GRAVES CATHREW, ESQ. AND JAMES A. KIFT, ESQ.

*Exchequer Chamber;*

BY JOHN S. ARMSTRONG, ESQ.

*Court of Criminal Appeal;*

BY JOHN S. ARMSTRONG, ESQ. AND W. H. FALLOON, ESQ.

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# JUDGES AND LAW OFFICERS,

1857-58.

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## COURT OF QUEEN'S BENCH.

*Lord Chief Justice.*—The Right Hon. THOMAS LEFROY.

*Second Justice.*—The Hon. PHILIP CECIL CRAMPTON.

*Third Justice.*—The Right Hon. LOUIS PEERIN.

*Fourth Justice.*—The Hon. JAMES O'BRIEN.

## COURT OF COMMON PLEAS.

*Lord Chief Justice.*—The Right Hon. JAMES HENRY MONAHAN.

*Second Justice.*—The Right Hon. NICHOLAS BALL.

*Third Justice.*—The Right Hon. WILLIAM KEOGH.

*Fourth Justice.*—The Hon. JONATHAN CHRISTIAN.

## COURT OF EXCHEQUER.

*Lord Chief Baron.*—The Right Hon. DAVID RICHARD PIGOT.

*Second Baron.*—The Hon. RICHARD PENNEFATHER.

*Third Baron.*—The Right Hon. JOHN RICHARDS.

*Fourth Baron.*—The Right Hon. RICHARD WILSON GREENE.

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WALTER BERWICK, Esq., Q. C.

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---

Mr. Justice JACKSON having died shortly before Christmas, 1857, JONATHAN CHRISTIAN, Esq., was promoted to the vacancy caused by his death, in the Court of Common Pleas, and was thereupon succeeded in the office of Solicitor-General by HENRY GEORGE HUGHES, Esq., Q.C.; and Mr. Justice MOORE having also died in the early part of January 1858, Serjeant O'BRIEN was appointed to succeed him as Fourth Justice in the Court of Queen's Bench.

**CORRIGENDA.**

**Page 130, line 12, for "defendant" read "plaintiff."**

**„ line 13, for "plaintiff" read "defendant."**

**„ line 14, for "defendant's" read "plaintiff's."**

**„ line 17, for "plaintiff" read "defendant."**

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COMMON LAW REPORTS,  
 OF CASES ARGUED AND DETERMINED IN  
 THE COURTS OF  
 QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,  
 Exchequer Chamber  
 AND  
 COURT OF CRIMINAL APPEAL.

BOSHELL v. ANDERSON.

(*Queen's Bench.*)

E. T. 1856.  
*Queen's Bench*  
 April 16.

**LIBEL.**—The summons and plaint contained two paragraphs, charging the defendant with printing and publishing certain libels, of and concerning the plaintiff, and of and concerning him in his occupation and business as a factor, and his mode of managing said business. To this the defendant pleaded that he did not print or publish, or cause or procure to be printed or published, of or concerning the plaintiff, or of or concerning him in his occupation or business, or of or concerning his mode of managing or conducting his business, the libels in plaint mentioned, or any part thereof, in manner and form in plaint alleged.

or published, the libel, of and concerning the plaintiff, or of and concerning him in his trade and business.—*Held*, on appeal, that the proper issue on such pleadings was, whether the defendant printed or published the libel, of or concerning the plaintiff in his trade and business?

*Held also*, that a party appealing from the issue settled by a Judge is not entitled to a postponement of the trial, or a stay of execution on verdict and judgment, when the Judge at the trial approves of the issues.

*Held also*, that on an appeal motion, affidavits subsequently filed cannot be used, and—

*Per Moore, J.*—Every material fact in a plaint may be traversed without an affidavit, but it must be done by separate defences.

E. T. 1856. Notice of trial, with the abstract and issues, was served on the  
*Queen's Bench* 21st of January, and the issues not being returned approved of, a  
 BOSHELL summons to settle the issues before CRAMPTON, J., was served,  
 v. and he directed two issues—First, whether the defendant printed  
 ANDERSON. or published, or caused to be printed or published, the libel in the  
 first cause of action mentioned, of or concerning the plaintiff, or  
 of or concerning the plaintiff in his occupation and business, or of  
 or concerning the plaintiff's mode of managing and conducting his  
 said business, as alleged? The issue on the second paragraph  
 was to the same effect. On the 5th of February, before the case  
 was called on for trial, defendant's attorney served a notice caution-  
 ing the plaintiff from proceeding to trial, and giving him notice of  
 appeal from the issues as settled by CRAMPTON, J. Notwithstanding  
 this notice, the trial was proceeded with, and a verdict found for the  
 plaintiff. On the 13th of February, pursuant to notice, an appli-  
 cation was made to the CHIEF JUSTICE, to stay judgment and exe-  
 cution on this verdict until the following Term, or until the appeal  
 motion was disposed of, which was granted, on the terms of the  
 defendant lodging in Court the amount of the verdict, and £50  
 on account of costs, his Lordship expressing himself entirely satis-  
 fied with the findings of the jury.

*Macdonogh* (with him *R. Armstrong*) now moved, on behalf of  
 the defendant, by way of appeal from the order of CRAMPTON, J.,  
 that same be varied, by directing that the admission made in the  
 abstract for *Nisi Prius*, to the effect that the defendant admitted the  
 printing and publishing by him of the libels, be expunged, and that  
 an issue be granted, whether the defendant printed and published,  
 or caused and procured to be printed and published, the libels in the  
 plaint mentioned, or either of them?

The traverse of the allegations in the plaint was proper, and if  
 the defence were ambiguous, the plaintiff should have moved to set  
 it aside as embarrassing. The issues as settled admitted the printing  
 and publishing of the libels by the defendant, of and concerning the  
 plaintiff, which would in fact have been admitting the entire cause  
 of action. There ought to be two issues; first, whether the libel was

published at all? secondly, was the libel published of and concerning the plaintiff in his occupation and business? but the only question on these settled issues was, whether or not the libel referred to the plaintiff?

E. T. 1856.  
*Queen's Bench*  
 BOSHELL  
 v.  
 ANDERSON.

*Rollestone* and *J. Clarke*, contra, were proceeding to read an affidavit filed since the hearing of the motion before CRAMPTON, J., when *Macdonogh* objected to its being used.

LEFROY, C. J.

An appeal from an order can only be heard on the same documents used in obtaining or resisting the order, unless there be some most unusual circumstances to take the case out of that general rule.

*Rollestone.*

There could be no other issue ~~knit~~ on the defence than the one tendered; defendant might have said he did not print and publish the libel, and that he did not print and publish it of and concerning the plaintiff in his business and occupation; but this, being a defence of double matter, would have required an affidavit, before an order for liberty to plead that matter would have been granted. A defendant cannot traverse two several matters alleged in a plaint.—[MOORE, J. What do you say to the 71st section of the Common Law Procedure Act, that defences by way of denial shall take issue on some one or more than one material matter of fact, alleged in the plaint, and all defences which admit the matter complained of, but rely on matter of avoidance, excuse or justification, shall be so expressly pleaded? Might not the defendant deny the matter of fact, and traverse that the libel was of and concerning the plaintiff?—LEFROY, C. J. There might be one hundred matters constituting one defence; but if there be a second substantive defence, that cannot be pleaded without leave.]—A defendant may plead several matters, if they all point to one defence, but not substantive defences; and the 56th section of the Common Law Procedure Act must be read with the 71st, that requiring the defence to state all facts which constitute the ground of defence, in ordinary language, and

E. T. 1856. without repetition, and as concise as is possible, consistent with  
*Queen's Bench* clearness; and if such defence is only applicable to a portion of  
BOSHELL the pleading, the portion shall be referred to.  
v.  
ANDERSON.

*Armstrong* replied.

LEFROY, C. J.

The ruling of my Brother CRAMPTON was quite right. The plaintiff complained of two libels, of and concerning the plaintiff, and of and concerning him in his business and occupation. The defendant was at liberty to traverse one or both these allegations, but the mode of traversing them is the question. That must be done separately and distinctly, and defendant is bound to show distinctly what it is he means to traverse. If the defendant had been allowed to take the course insisted on, his defence would be a negative pregnant, for it was a denial that he printed and published the libels, and that they related to the plaintiff. Under the old law, that would have been bad, as amounting to the general issue, and that plea is specially abolished by the Procedure Act; and yet under this defence the plaintiff would have the same uncertainty to meet if he had gone to trial on the issues sought by the defendant. The Judge was bound to take this complex defence, and make the issue compatible with the Procedure Act. He did accordingly select a single issue on each defence, and was quite right in not allowing the defendant to raise two defences out of one issue.

CRAMPTON, J.

There were two propositions in the plaint, which were necessary for the plaintiff to establish before he could succeed at the trial, viz., the publication of the libel by the defendant, and that it referred to the plaintiff. True, there may be no ambiguity in the defence, though it might have been intended; but it is nothing more than saying, I did not print and publish the libel of the plaintiff, and I deny that it referred to the plaintiff. A defendant might by several pleas say he did not print and publish the libel in question,

that it was not libellous, and that it did not refer to the plaintiff; **E. T. 1856.**  
but these defences must be put in separately, not in one defence.

*Queen's Bench*

**BOSHELL**

**v.**

**ANDERSON.**

**MOORE, J.**

I quite concur. A question was mooted, whether several matters of fact could be traversed? It is clear to my mind that, under the 70th and 71st sections of the Procedure Act, the defendant may traverse each matter of fact alleged, and that it was in this case competent for the defendant to say he did not print or publish the libel, and again that he did not print and publish it of and concerning the plaintiff. In this defence he has denied but one allegation of the plaint, viz., that he did not print or publish the libel of and concerning the plaintiff. I am of opinion that, without an affidavit, every material fact in a plaint may be traversed, but that it must be done in several pleas. The order on the settling of the issues was quite right.

**Motion refused, with costs.**

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M. T. 1856.

Eschequer.

MICHAEL CARROLL

v.

WILSON KENNEDY, one of the Public Officers of the  
Tipperary Joint-stock Banking Company.

(Eschequer.)

Nov. 10.

In a *scire facias* against a shareholder of a Joint-stock Banking Company, upon a judgment obtained against the public officer, under the 6 G. 4, c. 42, it was stated that there were no effects or property of the Company, same being under the administration of the Court of Chancery. The defendant pleaded that the Bank was one within the Bankers' Act, 33 G. 2, c. 14, and being in debt, had stopped payment, and that thereupon its property and effects became liable to be administered, and were under the administration of Chancery (but without stating the nature of the administration proceeding.)

SCIRE FACIAS, to have execution of a judgment against James Scully, a shareholder of the Tipperary Joint-stock Bank. The *scire facias* stated the judgment obtained by the plaintiff against Wilson Kennedy, a public officer of the Tipperary Bank, on the 10th of March 1856, for the sum of £1306. 8s. 2d., and proceeded to allege that the plaintiff was entitled to issue execution thereon, and that there was then no property or effects of the said copartnership whereupon to bring such execution, same being under the administration of the Court of Chancery in Ireland: that the said Wilson Kennedy was, before and at the time of the commencement of the suit, and at the time of giving said judgment still was, one of the public officers of certain persons, more than six in number, united in the said copartnership, by the name and description of the Tipperary Joint-stock Bank, for the purpose of carrying on the trade and business of bankers in Ireland, pursuant to an Act of Parliament passed in the 6 G. 4, entitled "An Act for the

On demurrer to this defence—*Held*, that in the absence of such a statement, it could not be assumed that the property was being administered under the Bankers' Act, so as to raise the question whether that Act was repealed by the 6 G. 4; and that (assuming both those Acts to be in force) the liability of the Company's property to be applied in a Court of Equity, under the Bankers' Act, for the benefit of the creditors, afforded no defence to a proceeding at Law under the 6 G. 4, as it would not have done to a proceeding at Common Law before that Act passed.

*Seemle*—That even if it appeared that a decree in Chancery had been made for the administration of the Company's property, under the Bankers' Act, such a decree could not be pleaded as a defence at Law; but that the defendant's proper course would be to apply to Chancery for an injunction to restrain the proceedings at Law.

*Quare*, whether the 6 G. 4, c. 42, had the effect of repealing the Bankers' Act?

better regulation of Copartnerships of certain Banks in Ireland," and other the statutes in that case made and provided; and which said persons, under said name and description, carried on the trade and business of bankers in Ireland, pursuant to the said statutes, before and at the time when the said causes of action accrued from the said copartnership to the plaintiff, for and in respect of which said judgment was given; and that the said James Scully was then a shareholder and member of the said copartnership.

M. T. 1856.  
*Eschequer.*  
 CARROLL  
 v.  
 KENNEDY.

To this writ James Scully pleaded the following defence:—That the said copartnership, called the Tipperary Joint-stock Bank, in said *sci. fa.* mentioned, carried on the trade and business of bankers in Ireland, after the passing of a certain Act of Parliament, passed in the 33 G. 2, entitled "An Act for repealing an Act passed in this kingdom in the 8 G. 1, entitled 'An Act for the better securing the Payment of Bankers' Notes, and for providing a more effectual remedy for the security and payment of Debts due by Bankers;'" and the members of the said copartnership were bankers within the meaning of the said Act; and the said Bank, on the 20th of February 1856, stopped payment, and was, at the time of such stoppage, largely indebted to divers persons; and thereupon the property and effects of the said Bank became liable to be administered by the Court of Chancery in Ireland, and are, as in said *sci. fa.* stated, under the administration of said Court; and that by reason thereof the provisions of the Act of the 6 G. 4, in the said *sci. fa.* mentioned, are not applicable, and that the said plaintiff was not entitled to issue execution.

Demurrer to this defence, upon the following grounds:—That the said Act of Parliament passed in the 33 G. 2 does not apply to the Tipperary Joint-stock Bank; that it does not appear by the said defence that the said James Scully complied with the provisions of the 33 G. 2; that the said Act of the 33 G. 2 does not prevent the enforcing of the provisions of the Act of the 6 G. 4, in the writ of *sci. fa.* mentioned.

*D. C. Heron*, with him *G. Fitzgibbon*, for the demurrer.

Two propositions are involved in this defence: first, that the Act of 33 G. 2 applies at all; and secondly, that, if it does apply,



M. T. 1856. the plaintiff is not entitled to the benefit of the Act of the 6 G. 4, c. 42. As to the second point: In *Acheson v. Hodges* (a), the Court refused to restrain a creditor issuing execution under the 6 G. 4, against a shareholder, even though a receiver had been appointed over the assets of the Company. In *Fawcett v. Hodges* (b), the Master of the Rolls appointed a receiver, notwithstanding that the plaintiff had proceeded against the shareholders by *sci. fa.*, as we do here. By the 6 G. 4, c. 42, ss. 17 & 18, the plaintiff is entitled to execution. Our proper mode of procedure is by *scire facias*, not by a mere suggestion: *Bosanquet v. Ransford* (c).

As to the first proposition, viz., that the 33 G. 2 applies to the Tipperary Bank, I contend that it does not; for it appears to have been contemplated by the Legislature that copartnerships under 6 G. 4 should be entirely regulated by the 6 G. 4. In the first place, it has made numerous alterations in the Common Law liabilities of partners:—first, in the transfer of liabilities, as the incoming partners are liable to the antecedent debts of the concern: *Addison on Contracts*, pp. 744, 745, 762 (4th ed.); *Kirwan v. Kirwan* (d); *Harris v. Farwell* (e); *Wilson v. Bailey* (f); *Whitehead v. Barron* (g); *Burnes v. Pennell* (h). Another alteration is the restriction of the Common Law liability by the three years' limitation under ss. 18 & 22: *Barker v. Buttress* (i). Another alteration is a complete inversion of liability, as those primarily liable at Common Law are made secondarily liable by the statute, s. 18. The next alteration is, that, before any member can be charged personally, proceedings must have been taken against the public officer, and judgment obtained against him: *Addison on Contracts*, p. 772; *Dodgson v. Scott* (k); *Steward v. Greaves* (l).

(a) FL & K. 371.

(b) 3 Ir. Eq. Rep. 232.

(c) 2 Q. B. 972.

(d) 2 Cr. & M. 617.

(e) 15 Beav. 31.

(f) 9 Dowl. 18.

(g) 2 Moo. & R. 248.

(h) 2 H. L. Cas. 521.

(i) 7 Beav. 135.

(k) 17 Law Jour., Ex. 321; S. C., 2 Ex. 457.

(l) 10 M. & W. 711.

The next is a resulting distinction from the alteration in the Common Law principles of notice: *Wordsworth*, p. 156 (6th ed.). Great inconvenience would arise from holding a co-partner of a Joint-stock Bank to be a banker within the 33 G. 2; as, for instance, the 29 G. 2, c. 16, s. 3 (which is incorporated with the 33 G. 2), enacted, that any clerk of a banker embezzling public money should be guilty of felony, without benefit of clergy; therefore any shareholder's clerk who embezzled public money would be liable to those penalties. Again, by the 33 G. 2, s. 2, conveyances of bankers not registered within one month are declared void against creditors, although given for valuable consideration: thus the General Registry Acts are altered. Again, freedom from arrest is given by the 33 G. 2, upon the banker's executing a conveyance of all his property in trust for creditors; whilst the 6 G. 4 gives power to issue execution either against his goods or person; therefore in this respect the Acts are clearly contradictory. In every case decided in England, the Common Law liability has been considered as altered; and these cases have been decided since *Fawcett v. Hodges*. *Bank of England v. Johnson* (a); *Ness v. Angas* (b); *Ness v. Armstrong* (c); *Davison v. Farmer* (d). There is also a class of cases, of which *Crisp v. Bunbury* (e) is the leading one, deciding that where the Legislature gives a remedy, that alone can be followed.

The machinery of the 33 G. 2 is only applicable to Companies consisting of a few persons; as by the 29 G. 2, c. 16, bankers are to put their names upon their notes; whilst, under the 6 G. 4, c. 42, a Joint-stock Company may consist of any number of persons, who could not all, with convenience, be concurring parties.

Remedies are given by the 6 G. 4 against English shareholders, against whom the remedies of 33 G. 2 are not applicable; and this shows the policy of the Acts to be different: *Carroll v. Kennedy* (f).

M. T. 1856.

*Eschequer.*

CARROLL

v.

KENNEDY.

(a) 3 Ex. 598.

(c) 4 Ex. 21.

(e) 8 Bing. 395.

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(b) 3 Ex. 805.

(d) 6 Ex. 242.

(f) 2 Ir. Jur., N. S., 7.

M. T. 1856.

Exchequer.

CARROLL

v.

KENNEDY.

*Lawson and D. Lynch*, in support of the defence.

The first question is, whether the 33 *G.* 2 is still an existing Act? The second, whether, if so, it applies to this Company? The first considerations are those arising on the Acts themselves. This code commenced with the 29 *G.* 2, c. 16, which required the names of all the bankers to be subscribed to their notes. The second section of that Act enacts that no banker should engage in any other trade. Now this provision was repealed by the 5 *G.* 4, c. 73, which was the Act that called Joint-stock Banks into existence. If it had not been repealed, the fact of any general merchant being a shareholder would have rendered the Bank illegal: *Hall v. Franklin* (a). The 6 *G.* 4, c. 42, then repealed the 5 *G.* 4 (except so far as it had repealed other Acts); there is nothing in it to show an intention to repeal the earlier Acts; by the 17th section the bankruptcy of the partner is not to be the bankruptcy of the copartnership. The Currency Act, 8 & 9 *Vic.*, c. 37, recites the 6 *G.* 4, and gives new privileges to Joint-stock Banks under the latter, and goes on to regulate the manner in which they are to issue notes; and in section 5 it recites the 33 *G.* 2, and repeals the restriction therein. This shows obviously that, if not repealed, the restriction would have applied to partnerships under 6 *G.* 4, c. 42. In order that a repeal by implication should take place, the Acts must be irreconcilable or repugnant: *Bac. Abr., Statutes*, D. These Acts of *G.* 2 and *G.* 4 should be worked together.

This Bank stopped payment in February 1856, and the plaintiff, after that stoppage, recovered judgment against them in March, and he seeks now to be paid in full. We resist this, under the 8th section of the 33 *G.* 2, as the stoppage of payment was an act of bankruptcy, and thereupon the applicability of 6 *G.* 4 was put an end to, and the Bank was introduced into the category legislated for by 33 *G.* 2, c. 14, s. 8, which takes the control over their property out of their hands, and the creditors cannot thereupon proceed against their goods. No commission of bankruptcy could issue against the individuals for any act subsequent to the stoppage of payment.—  
[GREENE, B. You then dispute the decision in *Acheson v. Hodges* ?]

(a) 3 M. &amp; W. 259.

—In that case the legal right was admitted, while here it is denied. M. T. 1856.  
 The 7th section of the Bankers' Act enacts, that the persons of Eschequer.  
 bankers stopping payment, and vesting their estates in trustees for CARROLL  
 their creditors, shall be free from arrest. We admit that; and, unless v.  
 the banker complies with this requisite, his person is liable. The 40 KENNEDY.  
*G.* 3, c. 22, was passed to remedy a mistake in this clause. There is  
 no express provision as to execution against lands or goods.—[PENNE-  
 FATHER, B. The 33 *G.* 2 only says that his goods shall be liable;  
 and, if there be no proceedings taken under that Act, must the  
 creditor seeking to enforce his demand (no matter of what amount  
 that demand may be) be driven to file a bill in Equity, and not be  
 able to proceed at Law? There may be quite enough property to  
 pay all the creditors; and are they to be precluded from suing,  
 because it is suggested that they ought to be paid *pari passu*?]—  
 The 6 *G.* 4 was intended to meet the wants of solvent Companies:  
*Dodson v. Scott* (a). In *Hayden v. Carroll* (b), the Lord Chan-  
 cellor in his judgment says that, if a banker stops payment, he  
 instantly loses all control over any part of his property, real or  
 personal; he cannot receive debts due to him, or give legal dis-  
 charges for them; he cannot exercise any one act of dominion over  
 any part of his estate, unless it be a deed of trust for the benefit and  
 security of all his creditors. I admit that a *ca. sa.* might be issued,  
 but the plaintiff has sought too much by seeking execution against  
 lands, goods, or person; therefore it lies on him to allege by replica-  
 tion, that he is entitled to execution against the person: *Rawson*  
*v. Hinds* (c).—[PENNEFATHER, B. That case says the plea is good  
 “under the existing Acts;” but the pleading is clearly bad; and as  
 the demurrer there was overruled, it does not show the plea to have  
 been good]—As to the effect of 6 *G.* 4, c. 42: *Ness v. Angas* (d).  
 In *Prescott v. Buffery* (e), the lists of the proprietors, not filed at  
 the stamp-office within the prescribed time, were held not admissible  
 as evidence against the plaintiff in a *sci. fa.*, to show that at a given  
 time the garnishers were not proprietors.—[PIGOT, C. B. Was there  
 anything to prevent a creditor's proceeding at Common Law before

(a) *Ubi supra.*

(b) 3 Ridg. P. C. 598.

(c) 1 Huds. &amp; B. 599.

(d) *Ubi supra.*

(e) 1 C. B. 41.

M. T. 1856. the 6 G. 4? and is there anything now to prevent his proceeding  
Exchequer. under that Act?—On the stoppage of payment, the control is with-  
 CARROLL drawn, and the property only exists for the liabilities under 33 G. 3.  
 v.  
 KENNEDY. In the conclusion of the last judgment in *Acheson v. Hodges*, it is  
 distinctly stated, as the grounds of refusing to restrain parties from  
 proceeding, that, at all events, there remains an execution against  
 the person.

FIGOT, C. B.

We do not think it necessary to call on the plaintiff's Counsel ;  
 we do not entertain any doubt upon the question on which we have  
 to decide. The action was originally brought against Wilson Ken-  
 nedy, as the public officer of the Tipperary Joint-stock Banking  
 Company. Judgment was obtained in that action. On that judg-  
 ment a *scire facias* has been issued against the present defendant,  
 under the 6 G. 4, c. 42. The *sci. fa.*, after reciting the judgment,  
 states, that there are now no property or effects of the copartnership  
 whereupon the plaintiff may have execution ; "same being under the  
 administration of the Court of Chancery in Ireland." That Wilson  
 Kennedy was, at the bringing of the action, and the delivering of  
 the judgment, one of the public officers of the said copartnership,  
 which carried on the business of bankers, under the 6 G. 4, c. 42,  
 and the other statutes in that case made and provided ; and that the  
 present defendant to the *sci. fa.* is now a shareholder of the Com-  
 pany. To this *sci. fa.* the defendant put in a defence, consisting  
 partly of statements of facts, and partly of statements of law. It  
 states, that the members of the said Banking Company were bankers  
 within the meaning of the Act 33 G. 2, c. 14 ; that the said Bank,  
 on the 20th of February 1856, stopped payment, and was, at the time  
 of such stoppage, largely indebted to divers persons ; and that there-  
 upon the property and effects of the said Bank became liable to be  
 administered by the Court of Chancery in Ireland, and are, "as in the  
 said *scire facias* stated," under the administration of the said Court ;  
 and that, by reason thereof, the provisions of the Act of the 6 G. 4,  
 c. 42, are not applicable, and the plaintiff is not entitled to issue exe-  
 cution. The *sci. fa.* only states that there were no effects or property,

because same were under the administration of the Court of Chancery. It does not state how or why the property is under the administration of that Court. The defence repeats this statement, but does not state whether the Court of Chancery has assumed the administration of the property under the Bankers' Act, or the Winding-up Acts; or for what purpose the proceeding there has been instituted. In the absence of any such statement, either in the *scire facias* or in the defence, we cannot assume, upon this defence, that any proceeding is now pending under the Bankers' Act. The defence in effect says that, by reason of the Bankers' Act, the provisions of the 6 G. 4, c. 42, are inapplicable, on account of the stoppage of payment, which brings the Company within the Bankers' Act, 33 G. 2, c. 14.

M. T. 1856.

*Exchequer.*

CARROLL

v.

KENNEDY.

On the part of the plaintiff it is argued that, even supposing the Bankers' Act to be still unrepealed by any subsequent Act, there is no inconsistency with its provisions in proceeding under the 4 G. 4, c. 42. It was also suggested, on the part of the plaintiff, that the Bankers' Act was in effect repealed, at least as to Joint-stock Banks, by the latter statute. Upon this last suggestion it is unnecessary for us to pronounce any opinion; for we are clearly of opinion that, assuming that the Bankers' Act is in full operation, there is nothing in its provisions to prevent the present proceeding. I wish, however, to guard myself against giving any countenance to the suggestion that the former statute is not in force; a result which, I own, I should regard as a great calamity: for it would, in effect, leave the country without any Bankrupt Act in reference to Joint-stock Banks, unless some provisions of the first Winding-up Act can be regarded in the light of a bankrupt law. Assuming then, that the Bankers' Act is still in force, we have to consider its enactments in reference to the 6 G. 4, c. 42. Now, even if a decree had been obtained in the Court of Chancery, under the Bankers' Act, I should more than doubt that the defendant could plead such decree as a defence at Law. The proper course for taking advantage of it would, in my opinion, be to apply to the Court of Chancery to stay the proceedings at Law. No such decree, however, is pleaded here, and we have therefore only to consider whether the facts, that the Bank has stopped payment, and that (assuming the Bankers' Act still in force) the property of the Bank

M. T. 1856. is liable to be applied under its provisions, afford a defence to this  
*Exchequer.* *scire facias.*

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The provisions of the Bankers' Act, so far as they apply to the present case, are the following :—The 7th section enacts, that the persons of all bankers, who shall have stopped payment at any time between the first day of that Session of Parliament and the 15th of April 1760, and who, at any time between the said first day and the 1st of June 1760, shall have vested his whole real and personal estate, or a sufficient part thereof, in trustees, for the payment of all his debts and the expenses of that trust, shall be free from all arrests and executions at the suit of any of his or their creditors, until the 5th of March 1762; and that any such banker (if arrested) might apply to the Court, out of which such writ of execution should issue, or to the Court of Chancery, for redress. That section was (probably by some mistake) confined to a particular period; but it was afterwards, by the 40 G. 3, c. 22, s. 1, extended to all and every banker and bankers who had stopped payment since the 1st of April 1793, or who should at any time thereafter stop payment, and vest their whole real and personal estate, or a sufficient part thereof, in trustees, for the payment of all their debts, pursuant to the former statute. The result is, that at present all bankers under this statute, who stop payment and vest their property in trustees for the payment of their debts, under the Bankers' Act, are privileged from arrest. There are a variety of other provisions, providing for the case of the bankers stopping payment and vesting their property in trustees: it is unnecessary now to go through them in detail. Then the 8th section provides, that after any banker shall stop payment, all his real and personal estate, at the time of such stopping payment, shall be liable and subject to the payment of all and every his debts, of what nature or kind soever; the same to be without any regard or preference in point of payment (except certain debts therein mentioned). This section it is impossible for a Court of Law to apply; it can be applied only by a Court of Equity. If a Court of Equity shall apply it, a part of the jurisdiction of that Court will be, to stay all proceedings, other than under that Court. But until that shall be done, there is nothing to prevent the proceedings of creditors,

unless they be prevented by the 8th section. The *liability* of the property of the Company to be applied, without priority or preference, to the payment of all their debts, is perfectly consistent with the proceedings against the debtors in the ordinary way, until a Court of Equity shall be called into activity, and shall so apply the property under the Bankers' Act. If, before the statute 6 G. 4, c. 42, had been passed, an action had been brought against a banker after he had stopped payment, I think it is perfectly clear that the Bankers' Act would have afforded no defence to such action. I should so hold, on the enactments of the Bankers' Act alone. The 8th section says, the property of the banker shall be *liable* to be applied as there stated. It does not enact, that the property *shall* be so applied, and not otherwise. There is nothing in its provisions to make it obligatory on a creditor to proceed in a Court of Equity, and to forbear proceedings at Law. But, if any doubt existed on this subject, under the Bankers' Act alone, that doubt would be removed by the 40 G. 3, c. 22, which distinctly recognises the right of the creditor to proceed at Law, after a stoppage of payment. After reciting the Bankers' Act, and referring to its provisions as to exemption from arrest, and reciting that those provisions had been confined to a limited period, it in effect extends that exemption to all bankers who should have stopped payment since the 1st of April 1793, or who should thereafter stop payment, and who should have vested their whole real and personal estate in trustees for payment of their debts, &c., pursuant to the former statute; and this statute (s. 1) then enacts that, "in case such banker shall afterwards be arrested, prosecuted or "impeached, for any debt due before such time as he or they "stopped, or shall stop, payment, such banker shall be discharged "upon common bail, and shall and may plead in general that the "cause of such action or suit did accrue before such time as he "stopped payment; and may give this Act and the special matter "in evidence:" and the Act then allows the banker to give the certificate of his conforming to the provisions of the Acts, and the allowance of it, as proof of his having been a banker, and having stopped payment; and a verdict is directed to pass for the defendant, unless the certificate be impeached for a fraud.

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**M. T. 1856.** Here, then, is a specific provision, giving a defence to an action  
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The result of an action at Common Law would be a judgment, and then an execution, against the banker, though he had stopped payment. The same result is gained by a judgment against a public officer, and by issuing then (in default of property of the Company) execution in the manner pointed out by the 18th section of the Act.

We are therefore of opinion, that the plaintiff is entitled to maintain the *scire facias*, and that the demurrer to the defence must be allowed.

PENNEFATHER, RICHARDS and GREENE, B.B., concurred.

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Eschequer.

## BETTY and others v. NAIL and others.

Feb. 25.

EJECTMENT on the title, tried before Lefroy, C. J., at the Summer Assizes 1855, in the county of Kildare, to recover the possession of 108 acres of land in said county, and a certain sum for mesne rates.

At the trial, Counsel for the plaintiff proved a lease of the lands in question, dated the 28th of June 1728, by John and Elizabeth Warburton, to William Plowman, for three lives, with a covenant for perpetual renewal; and also a renewal of the same lease, dated the 17th of August 1822, from B. B. Warburton to Henry Plowman, who was the great-grandson of the original lessee. It was also proved by a witness, who stated that she was a relative of the Plowman family, that Henry Plowman went with his family to America in the year 1829; that she knew Benjamin Plowman, one of the plaintiffs, who was the eldest son and heir of Henry, that Henry had died in 1844 or 1845; that she had learned this from letters received from said Benjamin from America, in 1847 and 1855, which letters were produced to and proved by her; the one written in 1847 stated that Benjamin's father, the said Henry Plowman, had been dead four years; she also said that Benjamin was then in Upper Canada, and had never returned home since 1829; that Henry Plowman had returned to this country about fourteen or fifteen years ago, but only remained for a few months; that she had often seen Benjamin's handwriting, and that she believed the letter produced was written by him; and that her knowledge of Henry Plowman's death was entirely derived from correspondence with Benjamin Plowman; that Benjamin never received anything out of the property, and that she could not tell if Henry had done so either.

The husband of the last witness stated that the general reputation of the family was, that Henry Plowman had died about

A decree for possession in a civil-bill ejectment having been obtained against a tenant, defendant, who was dead at the time of the process, which was served by posting in his name on the premises, does not conclude the heir-at-law of that tenant from recovering in a cross ejectment. Evidence of reputation of the family, that, at the time of the commencement of the proceedings, the tenant was then dead, is admissible to prove his death at that time.

*Seemle*, the source from which such family reputation is derived does not take away its admissibility as evidence, although it may weaken its force with the jury.

H. T. 1856. fourteen or fifteen years ago, and that this reputation was founded on what the former witness had learned from the said correspondence with Benjamin Plowman.

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Counsel for the plaintiff then gave in evidence a petition in Chancery, praying for a receiver over the said lands, in a matter of *Ruttle, petitioner ; Plowman, respondent* : and examined the receiver, who proved that he had been appointed receiver in May 1849, and had received payments of the rent of the premises up to November 1850 ; and it was also proved that a sub-lease for lives renewable for ever had been granted in 1792, by William Plowman, the interest in which had afterwards become vested in Mr. Betty ; and a person who had acted as agent for Mr. Betty was examined, and proved receipts of rent by him up to the year 1851, when Mr. Betty died, and payments by him of the head rents to the receiver and to the petitioner Ruttle, and others representing the interest of the Plowmans. The plaintiffs also proved the will of Mr. Betty, whereby his interest became vested in Catherine Betty, another of the plaintiffs.

The plaintiffs' case having closed, the defendants then tendered in evidence a certain civil-bill ejectment, brought in January 1852, for recovery of these lands, by the defendants, against Henry Plowman, William Plowman and others, including the occupying tenants of the lands ; and also a civil-bill decree, with the Sheriff's warrant and return of execution on the 9th of January 1852 ; and the extract from the book of the Clerk of the Peace of the case, and of the entry of the decree. They then examined the bailiff and process-server, who proved execution of the *habere* under said decree ; and that upon the hearing of the civil-bill ejectment he had been examined as a witness, and had proved the service of the ejectment in the following manner, viz., that he posted a copy for William Plowman, and another for Henry Plowman, on the premises, on the parish chapel and on the parish church, and had served the occupying tenants regularly. It was also proved by another witness, who had been examined at the hearing of the said civil-bill, that he had proved that a year's rent was then due ; that he had then also proved the handwriting of another person (who had been employed

to serve the said ejectment upon certain of the tenants, and who was ill at the hearing of the said civil-bill) to a memorandum made by him (the said process-server) of the service upon certain others of the defendants in said civil-bill ejectment; and that that memorandum had been received by the Assistant-Barrister as evidence of said services; and that that there had been no defence to said civil-bill.

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Counsel for the defendants then contended that no proceedings by way of appeal or for redemption having been taken, the decree of the Assistant-Barrister's Court was final, and a bar to the present action; and also that the existence of Henry Plowman at the time of the bringing the said civil-bill ejectment, and the service of that ejectment on him having been adjudicated upon below, the subject could not be re-discussed, and therefore that the evidence offered upon these points was inadmissible; and that even supposing that evidence of the time of the death of said Henry Plowman would then be admissible, that such fact should be proved by direct testimony, and that reputation of the family as to that fact was not admissible. And Counsel further contended that, even supposing that such evidence were admissible to prove the time of his death, still the evidence offered was not sufficient in law, as it was founded exclusively upon a correspondence with the plaintiff Benjamin Plowman himself, who was alive, and could have given direct evidence upon the point, and who was also himself mainly interested. The learned Judge, however, refusing to decide these points, it was agreed that a verdict should be found for the plaintiffs, ascertaining the amount of mesne rates, to be turned into a verdict for the defendants, if the Court should be of opinion that they were entitled thereto upon the above points. A conditional order to change the verdict, pursuant to the leave reserved, having been obtained—

*Macdonogh*, with whom were *Hayes* and *Kelly*, now showed cause.

In the civil-bill ejectment, the tenant defendant was Henry Plowman, who had been dead since 1844. The premises were evicted without any parties in Court to represent the interest.

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Benjamin Plowman was not served with that civil-bill, nor was the receiver in *Ruttle v. Plowman*, nor Mr. English (who was in receipt of a portion of the profit rent); the only service alleged was posting the civil-bill for Henry Plowman, a dead man. The Bettys were in the actual enjoyment of the estate in the lands, but it does not appear what was their exact interest. The Civil-bill Act, 15 Vic., c. 57, ss. 73, 81 & 86, provide for the service of the civil-bill process on the tenant defendant and the persons in actual possession; and the form of the proceedings in that Act is the same as that in the earlier Acts, 58 G. 3, c. 39, and 1 G. 4, c. 41. The Bettys cannot be presumed to be assignees of the interest of Henry Plowman; and even if this were presumed, they could not sustain this eviction under the civil-bill, as Catherine Betty, the devisee of Mr. Betty, was not served. The form of process requires the averment of the rent being due by that person who is in the previous part stated to hold the lands, and proof of the premises being then held by the tenant at the rent alleged must be given: Civil-bill Act, ss. 73 & 83. Every person having a legal estate in the lands must be served. There is a saving in 11 *Anne*, c. 2, s. 8, as to persons out of the kingdom: *Stuart v. Smith* (a); *Dunne v. Butler* (b); *App. 2 Fur. Land. & Ten.*, p. 1110; *Supple v. Raymond* (c); *Russell v. Thynne* (d); *Lessee Gunning v. Corr* (e); *Lessee Harris v. Prendergast* (f).

The Legislature, knowing the construction put on the Civil-bill Acts by the Courts here, have had ample opportunities of correcting it; but the new civil-bill code actually confirms it.

As to the evidence of the time of Henry Plowman's death, it was properly proved by the reputation of the family: *Shields v. Boucher* (g); 1 *Taylor on Evidence*, pp. 507, 510, 597, 678.

*H. Hamilton, H. Smyth, and L. S. Montgomery, contra.*

The memorandum-book of the process-officer, which we offered in

(a) Bat. 316, in notes.

(b) 2 Hud. & B. 179, n. 2.

(c) *Hayes*, 12.

(d) 6 Law Rec., N. S., 269.

(e) 3 Ir. Jur. 17, 23.

(f) 2 Fox & Sm. 34.

(g) 1 De G. & S. 60.

evidence, is legally receivable, in case of the illness of the officer: *H. T. 1856. Exchequer.*  
 Civil-bill Act, sec. 19. As to the question of service of the process, *BETTY v. NAIL.*  
*Nugent d. Keane v. The Earl of Bantry (a)*; *Walker v. Witter (b)*.  
 The Superior Courts will not set aside the judgment of an Inferior Court on the ground of non-service, unless there be fraud found by the jury: *Thompson v. Blackhurst (c)*. Service may be presumed: *Supple v. Purdon (d)*. The decree in the Civil-bill Court is conclusive: *Condon v. Earl of Kingston (e)*. The strict accuracy of the original ejectment need not be proved by the defendant in a cross-ejectment: *Doe d. Hitchens v. Lewis (f)*. It is not necessary under the ejectment statutes to serve a person having the legal estate, unless in possession: *Reynard and Mayne v. Croker (g)*. The presumption of law is in favour of the plaintiff, and that cannot be repelled except by positive evidence: *Piers v. Piers (h)*. In that case, Lord Cottenham adopts the principle laid down by Lord Lyndhurst in *Morris v. Davies (i)*, that "the presumption of law is "not lightly to be repelled; it is not to be broken in upon or shaken "by a mere balance of probability. The evidence for the purpose of "repelling it must be strong, distinct, satisfactory and conclusive." Lord Brougham and Lord Campbell affirm that view. As to the evidence offered of reputation of Henry Plowman's death, none of the letters were properly receivable, as they were declarations by the plaintiff Benjamin, a living person. If the source of the knowledge of the witness who proved the reputation in the family be traced to these letters, which are not themselves evidence, the evidence of that witness is valueless. If the plaintiff were claiming as heir-at-law, and had merely to prove the death of Henry, their evidence might be received for that purpose as matter of pedigree, but not to prove the time of his death, which is a question of matter of fact which should be clearly and satisfactorily proved. 1 *Taylor on Evidence*, p. 510. *Nepean v. Doe d. Knight (k)* lays down the

(a) 2 H. &amp; B. 156.

(c) 1 N. &amp; M. 266.

(e) 7 Ir. Jur. 247.

(g) Cooks &amp; Al. 12.

(i) 5 Cl. &amp; Fin. 163.

(b) 1 Doug. 1.

(d) Al. &amp; N. 137.

(f) 1 Burr. 619.

(h) 2 H. L. Cas. 360.

(k) 2 M. &amp; W. 894.

H. T. 1856. principle that the time of a person's death being material must be strictly proved.—[Pigot, C. B. There was no question of evidence for genealogical purposes in that case; it was a question whether there was a presumption of death before seven years which had elapsed since the last account of the person.—GREENE, B. The question is, whether evidence of family reputation was at all admissible?—It was not offered for a genealogical purpose: *Whitstock v. Waters* (a); *Figg v. Wedderburne* (b).—[Pigot, C. B. The plaintiff's title depended on his being heir of Henry, which rested upon proof of Henry's death; and evidence of the reputation which existed in the family at a particular time, of the fact that Henry was then dead, seems to me to have been properly submitted to the jury.]—The form of the decree does not require the defendants' names to be stated. Section 106 would enable us to amend by striking out Henry Plowman's name, and leaving the decree to state that these premises were held by the defendants in the civil-bill would be sufficient to bar the present plaintiffs' claim. The 83rd section renders it necessary to specify the tenancy and the names of the tenants, and the civil-bill decree must be conclusive on these points.—[Pigot, C. B. But here we are dealing with a person who was no party to the proceedings at all, and who was yet possessed of the interest; a death of a party during the proceedings would be error in fact.]—The decree is regular on the face of it, and the Civil-bill Court is a Court of Record (section 97). It has independent jurisdiction and cannot be reviewed. The 133rd section declares that the decree shall be final, if not appealed from. This decree is a judgment *in rem*, and, as a solemn declaration proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon, operates accordingly upon the *status* of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be: 2 *Smith's Leading Cases*, p. 593, in the *notes* to the *Duchess of Kingston's case*, where reference is made to *Scott v. Shearman* (c). *Thompson v. Buckhurst* (d) does not apply, as that was a case where the jury found that fraud existed. *Coffey v.*

(a) 4 C. &amp; P. 875.

(b) 6 Eng. Jur. 218.

(c) 2 Bl. 977.

(d) *Ubi sup.*

*Rahilly* (a) is contrary to what has been since decided in *Condon v. Earl of Kingston*.—[GREENE, B. The cases are somewhat similar; but in the latter we went on the grounds that the state of the law was different, and that the eviction under the decree was of a different interest from that claimed by the ejectment.]—That was a case of desertion. *Lessee Hilyard v. Day*, cited in *Coffey v. Rahilly*, decided that no objection that could have been made at the trial of the civil-bill ejectment could be made in a cross-ejectment brought to try the validity of the civil-bill decree. There is a distinction between judgments erroneous and judgments void: *Gold v. Strade* (b); *Bushe's case* (c); *The case of the Marshalsea* (d).—[PENNEFATHER, B. There should be some proceeding taken to bring the ejectment suit within the civil-bill jurisdiction; and can there be any such proceeding taken against a person not in existence? The Act directs that the tenant shall be brought before the Court by service, or, what is tantamount to it, i. e., substituted service.—GREENE, B. Would you say that this decree is conclusive against all the world that Henry Plowman was alive at its date? as that is the length you must push your argument to.]—No; I would not push it so far. *Condon v. Earl of Kingston* (e) shows that the Court will intend that such a mis-statement is merely a technical error, and might be amended.—[GREENE, B. That case arose on a slight misdescription in the process, which the Barrister might have amended under the 106th section, and which we did not think a sufficient ground for upsetting all the proceedings.]

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*Hayes*, in reply.

The object of the Civil-bill Act was to enforce payment of rent, not to create forfeitures. The 73rd section treats it as a mere matter of tenancy. The Civil-bill Court is an Inferior Court, and has no jurisdiction, except that conferred on it by statute, and unless the statute is complied with, its proceedings are invalid, and

(a) 1 Jones, 275.

(b) Carth. 148.

(c) 10 Co. 388.

(d) Cro. Eliz. 188.

(e) *Ubi sup.*



H. T. 1856. *Exchequer.* will be examined by the Superior Courts. Cases where service was not good: *Williams v. Lord Bagot* (a); *Buchanan v. Rucker* (b); *Ferguson v. Mahon* (c). There is no power to amend the proceedings where the error consists in misdescription of the tenancy: *Coffey v. Rahilly* (d).

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E. T. 1856. *Pigot, C. B.*

*May 7.*

There are two questions in this case. The first, whether there was evidence of the death of Henry Plowman? the second, whether the civil-bill decree was conclusive upon the parties? The evidence offered to prove the death of Henry was the reputation of the family. It was important in the action to prove the death of Henry before December 1847, and the question then is, whether the reputation of the family is evidence to prove the time of his death? It was argued, on the authority of the case in *Taylor on Evidence*, that the time of death was proveable as a matter of genealogical character, and therefore that evidence of reputation might be given.

It is not necessary to go so far in this case, for it was offered for this genealogical purpose, viz., to establish that the plaintiff was the heir of Henry; and for the purpose of proving heirship, you may prove the time of the ancestor's death by evidence of reputation. The time of death is important, to show to what extent he is entitled to the rents and profits of the estate; therefore this is entirely outside the authorities, supposing them to be law. The prevalent reputation in the family was that he was dead, and it was not necessary to prove the sources of that reputation; it may be important, in order to test the weight of that evidence, to examine into its sources, and it may be for the jury, on sifting the evidence, to ascertain whether there is enough to satisfy them that the death has occurred; but the admissibility of the evidence is never affected, by considerations of its weight. The principle on which this class of evidence is received is, that the circumstance is received as a known and acknowledged fact by the family who ought to know it, and who are not interested in admitting or denying it. It is plain

(a) 3 B. & Cr. 772.

(c) 11 Ad. & El. 179.

(b) 1 Camp. 63, 73.

(d) *Ubi sup.*

that here the proof of the death was sufficient evidence for the jury from which to find the time of death.

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The second question was, whether the civil-bill decree was conclusive or not? This process was brought for non-payment of rent, and stated that Henry Plowman was tenant of the lands, together with others, defendants; and we must conclude that all was done that the Assistant-Barrister could authorise, to serve these parties; but it appears that the tenant named in the civil-bill was the same Henry Plowman whose death is established to have taken place some years before the civil-bill was served. We have to decide whether this was a proceeding at all within the Act; and we are not dealing with the case of an existing party named in a civil-bill, and how far he may be estopped by the decree from saying that he was not served, but we are dealing with a case where a dead person is named.

The party must be named in the civil-bill decree, under the Act, and here the party named was dead when the civil-bill was served.—[His Lordship here read ss. 73, 83 and 93.]—Now in the present case the civil-bill stated, "Whereas Henry Plowman, one of the defendants, holds all that and those, &c., as tenant to the plaintiff," &c. The process represented Henry Plowman to be a living man, a tenant. But in fact the proceeding was against a dead man, and the present plaintiff was not a party to that proceeding, and consequently is not estopped by any adjudication *inter partes*; and what we have to consider is, whether we are to treat this as an adjudication which the plaintiff, although not named in the proceedings, cannot controvert? because the decree has not been appealed from, and that decree is for the possession of the land, and is an adjudication which the statute says shall be final if not appealed from.

It is not necessary to consider what might be the state of the case if a person had been named in the civil-bill who might be a defendant here; the present is a case in which there could be no defence, for the person named was then actually dead. The question comes to this, whether the Act of Parliament, which plainly provides for proceedings between the living, shall be held to extend to proceedings between the living and the dead? Whatever be the

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fact as to what the Assistant-Barrister may do with reference to amendments of variances between the statements of the cause of action and the evidence, or of omissions and misdescription in the description, addition and residence of the parties, all those shall be treated as within the rule *omnia rite acta presumuntur*; but when we are to consider what is the very foundation of the action, where the civil-bill states that he holds as tenant to the plaintiff, and where the Act directs that the civil-bill shall be against the tenant, we cannot hold that where the proceeding is against a dead man, a case not contemplated by the Act, and where it is impossible that there could be adverse litigation, it ought to conclude a person not a party to the process by service or by name.

It was argued that it would be a hardship on a landlord who cannot proceed, when he does not know who is the tenant or where he is. The answer is, that we are not to deal with inconveniences, but with the words of the Legislature. The considerations of convenience or of policy can only be resorted to, to help the construction of words that are ambiguous; and the Court is never slow to recur to the policy of the Act in giving it a construction; still where there are plain words in the Act, it must be bound by those words. When reasons of hardship are proposed, we should consider them on the other side also. Suppose a tenant residing in the country to die, leaving no children, a few days before the landlord commences proceedings, would it not be a hardship to sanction those proceedings, when they were taken without inquiry, making the deceased tenant a party, and treating him as still living, and not naming his heir, whereby the interest in the lands would be evicted, which belonged to the heir? and such a case as that might occur without any fraud on the part of the landlord.

Our course ought to be to adhere to the plain terms of the Act, and not to speculate on the policy of the Act. The landlord might have resorted to the Superior Courts, if the Inferior Court was incompetent to give him relief; and I never recollect any difficulty to have existed in asserting the landlord's rights in a case of this description. The words of the Act, that the decree shall be final and conclusive, are just as strong in reference to other proceedings

brought in the Civil-bill Court. An action of assumpsit is binding and conclusive between the parties, but it cannot be binding where the proceedings are brought against a person not living at the time.

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PENNEFATHER, B.

I concur in the judgment of my LORD CHIEF BARON, and will only say that, by the provisions of the Civil-bill Act, the tenant must be named and served, either by actual service or by substitution; and it is impossible to contend that a dead man is a tenant or can be served. The matter goes to the very foundation of the Barrister's jurisdiction; and it is essential that the landlord should ascertain, before he brings his action, whether his tenant be dead or alive, if he would ensure jurisdiction to the Court he has adopted, and give validity to its proceedings.

RICHARDS, B.

As to the first point. As I understand the evidence in this case, it came to this, that there was a reputation existing in the family, in or prior to the year 1851, that Henry Plowman at that time was dead—not that there was a reputation in the family in 1855 that he had died in 1851. With regard to the other point, I should endeavour to uphold the civil-bill ejectment, but I feel the difficulty so great, arising from the circumstance of the dead man being named in the process as tenant, that it cannot be overcome. I am, however, not prepared to say that the question of who was tenant in point of law, or any nice questions of that kind, would defeat the ejectment, or authorise the subsequent investigation of the grounds of the Barrister's decision upon new trial motions. *Condon v. Lord Kingston* does not apply to a case like the present.

GREENE, B.

I concur in the judgment of my Brethren, and wish also to be understood as resting my judgment on the second point on the same grounds as those expressed by my Brother RICHARDS; that a party is not to be at liberty to overhaul the proceedings before the

E. T. 1856. Assistant-Barrister, but that, under the peculiar circumstances of this case, the decree of the Assistant-Barrister is not conclusive.

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PIGOT, C. B., mentioned *Doe v. Griffith (a)*, in which it was held that proof, by one of a family, that a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, was *prima facie* evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment.

(a) 15 East. 293.

June 2, 3.

Right Hon. SIDNEY HERBERT v. E. MADDEN and others.

Ejectment for non-payment of rent, under the statutes, does not lie upon a concurrent or reversionary lease. The proceedings in ejectment are substituted only for entry; and where a lessor hath no right of entry, his proper course to determine the estate for condition broken is to make a claim.

Where a Private Act of Parliament gave power to a tenant for life to make

leases either concurrent or in possession, so as in every such lease there should be reserved a condition of re-entry:—*Held*, this should be construed *reddendo singulis singulis*, and did not make such a condition in a concurrent lease granted under the power effectual, so as to give the lessor a right of entry.

EJECTMENT for non-payment of rent.—The summons and plaint stated that six years' arrears were due. The defendant pleaded, firstly, denying the tenancy, and secondly, pleaded a lease, dated the 1st of July 1790, by Lord Fitzwilliam to Wm. Whittingham, of the lands and premises in question, for three lives, or the term of 78 years commencing from the 29th of September 1789, if the said lives should expire before the expiration of that time; and that the said W. Whittingham entered into possession under the said lease, and afterwards died previous to the year 1825, having first devised all his interest in the said demised premises to Jane Whittingham, who entered into possession of the said premises, by the assent of the said William's executors; and that she afterwards married John Burne, and that they (the said John and Jane Burne) by a sub-lease, dated the 24th of December 1825, demised to Peter

Madden the said premises from thenceforth, for one life, or thirty-one years commencing from the 25th of March then next, if the said life should expire within that time; that the said last-mentioned life dropped previous to the 8th of May 1839; and that, by indenture of lease, dated on that day (the lessor's reversion having in the meantime become vested in the plaintiff), and whilst both said leases of 1790 and 1825 were outstanding, he (the plaintiff) demised unto the said Peter Madden the same premises, and not more; and the defence then stated defendant's title to the premises, as the personal representative of said Peter Madden.

To this second defence the plaintiff replied that, before and at the time of making of a certain Private Act of Parliament of the 3 & 4 W. 4, passed for granting further powers to lease certain parts of the devised estates of the late Lord Fitzwilliam, then deceased, the plaintiff was, under the will of the said Lord Fitzwilliam, seised in his demesne as of freehold, for his life, of divers hereditaments set forth in the schedule to the said Act, and, amongst them, of the premises demised by the said lease of 1839; and that by the said Act, after reciting as therein, it is enacted that it should be lawful for the plaintiff, during his life, and after his decease for the several other persons therein authorised, by indenture or indentures, sealed and delivered, and attested by two or more witnesses, to demise, lease or grant all or any part of the messuages or dwelling-houses, hereditaments, &c., specified in the schedule thereto, at any time thereafter, before the several leases of the same hereditaments which, at the time of the passing of the said Act were subsisting, should respectively have expired by efflux of time; and either upon the surrender, or without requiring the previous surrender, of such subsisting leases thereof respectively; unto any person or persons, for any number of years not exceeding ninety-nine years respectively; for the purposes in that behalf in said Act mentioned: and so, as that in every such lease to be made, there should be contained a condition or clause of re-entry, in case of the non-payment of the rent or rents to be thereby reserved, or of the breach or non-performance of any of the covenants, provisoes and conditions therein mentioned: and so, as that no lease

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should be made by virtue of the said Act, of any hereditaments which should be held for any previous term or terms of years, of which more than sixty years should be then unexpired. That at the time of making the said lease of 1839, the said lease of 1790, in the second defence mentioned, was a subsisting lease of certain of the hereditaments, set forth in the said schedule to the said Act, for an unexpired term of less than sixty years, to wit, for twenty-eight years, of which the premises demised by the lease of 1839 were parcel: and that by indenture, dated the 8th of May 1839, after reciting the said subsisting lease of 1790, and the seisin of the plaintiff as tenant for life of the said premises, and that he was entitled, under the said statute, to grant leases of the said premises; he (the said plaintiff), by force and virtue and in exercise of the said power by the said Act given to him, and of all other powers, &c., demised unto said Peter Madden the said premises (claimed by the ejectment), for ninety-nine years: and that the said indenture was duly executed as required by the said power; and was granted for the purposes required by the said Act, and complied with the requisitions thereof: and that, in the said indenture of 1839 was contained a condition or clause of re-entry, in case of the non-payment of the rent thereby reserved, or of the breach or non-performance of the covenants, &c., therein contained: and the replication concluded with a general averment of compliance with the conditions and provisos of the statute, and that the summons and plaint was filed to evict the lease of 1839.

The plaintiff, by leave of the Court, also demurred to the said second defence; and the defendant demurred to the above replication.

The plaintiff's points for argument were as follow:—First, that the second defence admits the relationship of landlord and tenant under a lease to exist between the parties, and that the reserved rent is due; but denies the right to maintain an ejectment for non-payment of that rent, without showing any grounds for such denial. Secondly, that the plaintiff being unable to enter, because of the existence of the leases of 1790 and 1825, is no answer to the action; because such a right is not necessary in order that the action

should be maintained, and it is impossible by the acts of the parties themselves here, and therefore is dispensed with. Thirdly, that by reason of the lease of 1825, the lease of 1839 operated as a grant of the reversion expectant on the lease of 1790, and the defence should have negatived the existence of a condition of re-entry on non-payment of rent in such grant, a condition which the plaintiff could take advantage of by claim in this action.

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The following were the points relied on by the defendant:—That the plaintiff admits he has no right of entry on the premises, by reason of the outstanding leases and grant of the reversion; that the lease of 1839 was a grant of a reversion and incorporeal hereditament, and cannot be evicted for non-payment of rent.

*C. H. Woodroffe* (with him *Napier*), for the plaintiff, opened the demurrer to the defence.

The precise point raised here, on the ejectment statutes, has never been decided. In all the cases hitherto decided on the subject, there was a condition of re-entry, which had been defeated by some severance, re-demise, or other act; but here, as the lease of 1839 could only operate as a grant of the reversion, there never could be any valid condition of re-entry reserved, by the very nature of the estate granted. The question is, whether an ejectment will lie in a Superior Court, where claim would lie? This is a grant of a pure reversion, and therefore differs from those cases where there was any portion of land into which the lessor could enter. *Jackson's Charities v. Jackson* (a) was a case of the latter description; and in it, all the cases and the law on this subject are fully reviewed. Chief Baron Joy there says:—"The landlord who has executed a lease of lands, part whereof is in possession and part in reversion at the time, may afterwards evict the tenant for condition broken; he may enter upon any part of the land in the name of the whole, and that will re-vest the entire estate in him; he will thereupon be in as of his old estate, and thereby evict the tenant from every interest he might claim under him. A condition may be annexed to the grant of a mere reversion, and by it the grant may be

(a) *Hayes & Jo.* 442; *S. C.*, 2 *Law Rec.*, N. S., 36.



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“defeated. But how, in such a case, is the grantor to take advantage of the condition broken? Lord *Coke*, in his *Commentary on Littleton*, 218 *a*, points out the mode. He says:—‘Regularly, “when any man will take advantage of a condition, if he may enter, “he must enter, and when he cannot enter, he must make a claim.’” And he also lays it down broadly, that a right of re-entry at Common Law is not necessary in order to maintain an ejectment for non-payment of rent.—[PENNEFATHER, B. Claim is put in contradistinction to entry.]—*Co. Lit.* speaks of two different things as necessary to revest the estate, so as to ground a writ *de ejectione firma*; first, entry on the land, where entry was possible, and claim, where claim alone was possible. The writ of summons in ejectment was substituted for entry in the former case, and, *a fortiori*, it is substituted for claim, where claim alone is possible. In *Delap v. Leonard* (a), PENNEFATHER, C.J., held that an ejectment would lie under the statutes, where the condition was suspended; and this case also was different from the present, in which there is no condition which was ever valid. The ejectment statutes are one complete code of remedial law, and are to be construed together as expanding the landlord’s remedies, and not narrowing them. They are, the 11 *Anne*, c. 2; 4 *G.* 1, c. 5; 8 *G.* 1, c. 2; 5 *G.* 2, c. 4; 25 *G.* 2, c. 13; 15 & 16 *G.* 3, c. 27. The 4 *G.* 1, c. 5, does not mention one word about the landlord’s right of re-entry; it was passed to expand the rights which the landlord had under the 11 *Anne*. By section 3 it empowers “any” landlord to bring his ejectment where the year’s rent is due, and does not, in terms, restrict that right to a landlord with a right of re-entry. The 8 *G.* 1, c. 2, contains no mention of the necessity of a condition of re-entry.—[PENNEFATHER, B. That Act was passed with reference to strangers taking defence.]—The 5 *G.* 2, c. 4, recites a doubt as to whether ejectment could be maintained where there is no clause of re-entry reserved, and provides for those cases.

*H. Fitzgibbon* (with *G. Fitzgibbon*), for the defendant.

The Private Act does not put the plaintiff in any other position

(a) 5 *Ir. Law Rep.* 287; in *Error*, 6 *Ir. Law Rep.* 473.

than a common lessor ; his only remedy would be debt for the rent ; T. T. 1856. and the making of the lease does not give him any new right. *Co. Exchequer.*  
*Lit.*, 47 *a*, states, that rent cannot be reserved out of an incorporeal *HERBERT*  
hereditament ; and that a reversion or remainders of lands may be *v.*  
granted reserving a rent, for the apparent possibility that it may *MADDEN.*  
come in possession. *Lessee Westropp v. Moore (a).*

*Napier*, for the plaintiff, in reply.

The 15 & 16 *G.* 3, c. 27, s. 3, enables an ejectment for non-payment of rent, reserved upon leases of tithes or other ecclesiastical dues, to be brought ; where one year's rent is due, and the lessor has a right by law to re-enter. Now tithes lie in grant, and not in livery, and the Legislature, in this provision, contemplates a right of re-entry to be reserved by the lease. Then in our case, we have the Private Act (3 & 4 *W.* 4, c. 26) which, in like manner, intends to give us a power of recovering by ejectment for non-payment of rent, upon the condition for re-entry, which the same Act requires us to reserve in leases made under it ; even though such leases be concurrent or reversionary. The Legislature cannot intend that the condition, which it requires to be reserved, should be perfectly inoperative. The condition in *Jackson's Charities v. Jackson (b)* was to re-enter, and there was, in that case, an Act of Parliament enabling the plaintiff to make the lease ; and Baron Smith says, "When the "Act gave the plaintiffs power to make the lease, it also gave "them all those rights which necessarily arise out of the relation "created thereby." The condition cannot be apportioned, and entry must be made in the name of the whole : *Delacour v. M'Carthy (c)*. If a reversion be granted on condition, and the condition be broken, if there cannot be an entry, then a claim shall serve *(d)*. And what is the summons and plaint in ejectment but a claim ?—  
[PENNEFATHER, B. An ejectment will not lie where claim is the proper remedy. In the case of tithes, it lies by express enactment. No injury could be done to any one, by the formal execution of the *habere*, as there is no actual possession ; and the contract

(a) 2 Fox. & S. 363.

(b) *Ubi sup.*

(c) *Hayes & Jo.* 474.

(d) *Plowd.* 133 *a.*

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 MADDEN. may be then put an end to ; but it is not the same in an ejectment for a reversion, which goes for the land, not for the tithes.]—The question is whether the ejectment statutes enable us?—[PENNEFATHER, B. The test is, could you bring an ejectment for a reversion, declaring so?]  
 —When we cannot enter, we claim. Our right to re-enter is by contract ; and claim is the way of carrying out that contract.

PICOT, C. B.

We are all of opinion, on substantial grounds, that this ejectment cannot be maintained under the ejectment statutes. It is brought where a lease was granted in reversion ; there being an outstanding lease, incident to which a reversion existed at the time of the grant, and which lease is still subsisting. It has been suggested in argument, upon the views expressed by Judges of the highest authority, that these statutes were to be treated as creating new rights and remedies successively for the landlord. Without going over all the statutes, which have been reviewed by Judges Crompton and Burton, who differed from Pennefather, C. J., in *Delap v. Leonard*, it may be enough to say, that it appears very clear that all those statutes had regard to the relations subsisting between the parties, which was contemplated in the first Act of Parliament (11 *Anne*, c. 2). No other ejectment was contemplated by that statute than that taking place between landlord and tenant, or lessor and lessee ; and the subsequent statutes only enable the landlord, where there can be no forfeiture of the lease, by reason of there being no clause or condition of re-entry reserved therein, to proceed to recover possession of the land, as if such a condition had been contained in the lease. The whole structure of the statutes shows this intention. The best test of their meaning is found in those provisions, by which they apply the sanction of law to make the judgment efficient ; and that is, the delivery of possession under the writ by the Sheriff : and so [important is that sanction of law, that it is from the period of execution of the writ by the Sheriff that the determination of the lease is considered, by the Acts of Parliament, to take place ;

then, and then only, is the lease determined ; it subsists by law (unless so far as the parties may be estopped by the judgment), and it is not determined until that time ; and if the landlord, before that time, receives the rent and costs, the forfeiture is waived, and the lease continues to subsist ; but if the *habere* be executed, the parties can only continue to hold under some new contract which may be made, or by taking proceedings in Equity, for the purpose of being restored by redemption. What would occur, supposing we were to hold that a reversion could be made the subject of an ejectment ?

The result of those provisions of the Ejectment Act, which say, that in case the lessee or assignee, or other person claiming under the lease, shall permit judgment to be had, and execution executed, without paying the rent and costs, or filing a bill in Equity within six months after execution executed, for redemption ; then he shall be barred and foreclosed from all relief and remedy—is, to give the lessee, &c., six months, after execution executed, to redeem the possession. Now execution executed is delivery of the possession to the landlord ; but that delivery would be postponed until after the subsisting sublease has expired ; and then (according to the above provisions of the Acts of Parliament) the lessee or his assignee may, after the execution of the *habere* (which may not be until fifty or sixty years after judgment), and upon payment of the rent which the affidavit states to be due at the time of bringing the ejectment, revest the estate ; provided that payment be made within six months after the execution executed : and the landlord would be entitled to all the intervening profits between judgment obtained and execution. The result would (in the present case) be, that the landlord would be entitled to receive the rent for twenty-eight years, and, after the expiration of that time, would be bound to restore the possession to the tenant, upon his complying with the requisites I have mentioned. This could never have been intended by the Legislature. It could never occur in the case of land of which the possession might be recovered. No such thing could occur in the case of *Jackson's Charities*, and of *Delacour v. M'Carthy*, because, there, there was a portion into which the landlord might enter in the name of the whole. It appears to me, with deference

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to so high an authority, that the reasoning of Joy, C. B., that this ejectment may be maintained when it is brought with respect to contract, and not to land, rather leads to an opposite conclusion. In the case of a reversion, or an incorporeal hereditament, there was a form of law to determine the estate for a condition broken. According to Lord Coke, it is not optional with a party as to how, he must proceed to determine the estate—if he may enter, he must enter:—to defeat the estate there must be actual entry. For the purpose of effecting entry, proceedings at Common Law must be adopted; ejectment, for instance, where an obstruction is raised by the tenant. The old form of proceeding to obtain entry was by writ of *ejectione firmæ*, which was equivalent to the later proceeding of ejectment by a fictitious form of law; but where the land is circumstanced so as to be incapable of the subject of an ejectment, then the law substituting claim takes effect, and the claim determines the estate. In the case of a demise of tithes, or of a reversion, or other incorporeal hereditament, where the Common Law admitted of no ejectment, the effect of a claim was to determine the estate, and entitle the party, as soon as the subsisting or outstanding interest expired, to enter; he had no other form to adopt; the condition was broken by the act of the tenant; the estate was determined by the claim; and, upon the determination of the subsisting or outstanding estate, he had a right to the land. Ejectment would not there apply. In the present case, if Mr. Herbert had made his claim, it is clear that the estate of the tenant under the lease of 1839 would determine without the necessity of any form at Common Law. It might have been a convenient thing that some form of judicial proceeding should take place, determining that the party was entitled to defeat the estate, and enabling him to have the matter investigated; but this is not done by the ejectment statutes: they have dealt entirely with cases between landlord and tenant; and the same test is to be applied in examining the Private Act of Parliament. We are of opinion that, that cannot be made the subject of ejectment, the possession of which the Sheriff cannot deliver. He could not execute the writ without destroying the interest of the tenant, who was entitled to hold; and having

read the judgments of Justices Crampton and Burton on this question, in *Delap v. Leonard*, we fully concur in their views; and, as we have just stated, we consider that these statutes are wholly inapplicable to the case of a reversion.

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PENNEFATHER, B.

The LORD CHIEF BARON has very clearly stated the views he entertains as to the ejectment statutes, and in which I entirely concur. Those statutes are conversant about land, where a writ of *ejectione firmæ* at Common Law could have lain; that is clear, on the different statutes. The wording of the statutes, as to the interest of the lessor and lessee, and the provisions as to the execution of the writ, show that the writ is to be executed; and therefore, that the groundwork of the proceedings in ejectment must be hereditaments on which it can be executed,—that the subject-matter of these statutes must be land, on which the Sheriff may enter and execute the *habere*. I do not think it necessary to meddle with the *vexata questio*, whether a person must have a reversion in himself; the cases are not the same: and I do not express any opinion upon that question. The difficulties, which would arise from the postponement of the execution of the *habere*, until the expiration of the particular estate, have been very clearly stated by the learned CHIEF BARON. The Counsel for the plaintiff must have been aware of these difficulties, necessarily created by reason of the consequences which would follow the immediate execution of the *habere*, viz., dispossession of those who were not parties to the contract, who were entitled to the possession, and who might thus be deprived of it. Counsel said, the Court would restrain the execution of the *habere* until after the determination of the particular estate. This proposition destroys the argument for the right to bring the ejectment, as it is upon the execution of the *habere* that the eviction takes place, and from that it is counted; so that if the party be prevented from executing the *habere*, now for twenty-eight years or thereabouts, the whole object of the ejectment would be defeated, as the lease of 1839 would for that time be a subsisting

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interest. The Private Act of Parliament was made for a proper purpose, viz., to enable Mr. Herbert, who was tenant for life, to renew and lease certain portions of the land; and provides that he may make leases, either in possession to the occupier, or in reversion to persons not occupying: and the Act being general, and intending to provide for the interests of the remainderman, directs that these leases shall be made at the full value, and contain conditions of re-entry. It is argued then, that the Legislature thereby meant to give an immediate right of re-entry in every case; but no such thing can be inferred to have been meant. This provision in the Act is to be construed *reddendo singula singulis*; the leases may be made either in possession or reversion, and this is merely a general direction to put in that condition; meaning where such a condition would be effectual. Such a condition can have no operation in a reversionary lease, until that lease takes effect in possession, and then the condition may arise. There was no intention that this clause should take effect in a lease of a reversion. It is unnecessary to say more on this point. The lease may be determined by claim, but not by entry, until the party has a right of entry, by cesser or determination of the subsisting estate.

RICHARDS, B.

I concur with the CHIEF BARON and my Brother PENNEFATHER, that the action of ejectment is a possessory action. I do not think that the forms given by the Common Law Procedure Act 1853 should be altogether thrown out of consideration; they are very important, to see how the Legislature has dealt with this action. In the 194th section, directing this proceeding, the words are:—"Where any person shall claim possession of any lands, tenements, or hereditaments, and shall desire to proceed for recovery of the same," &c. Then in the form of the writ, judgment is prayed to "recover the possession of the lands and tenements." Next, the form of the judgment is as follows:—"Therefore it is considered that the plaintiffs do recover possession of the land in the writ mentioned, with the appurtenances;" and upon that

judgment, execution is to issue for the recovery of the possession (s. 209). It is the duty of the plaintiff to serve the summons on every person in possession, even under a prior lease, to evict which is stated not to be the intention of the plaintiff here. But if the plaintiff obtained judgment, that judgment would be against such person holding under a prior lease, and he would, therefore, have a right to take defence to the action; and if he did take defence, what answer here would be given to him? The action is brought to recover the possession, to which possession the plaintiff is not entitled, and whilst all the time he disclaims all intention of taking that possession. The *habere* is a public writ, and the whole world are to take notice of it. It would produce inextricable confusion if the plaintiff might proceed as here contended for. But if there were a doubt on the subject, the statute of the 15 & 16 G. 3, c. 27, ought to be conclusive evidence against the proceeding by ejectment for a reversion. That is an *enacting* law; for it is because ejectment did not lie for things which lay in grant alone, that it was passed. The arguments raised on the Private Act have been fully discussed by my Brother PENNEFATHER. That Act was not intended to put Mr. Herbert in a different position from the rest of mankind. It gave him, a tenant for life, the same power which he would have had, were he seised in fee; but no more. A man seised in fee may make a reversionary lease, and reserve a condition of re-entry; but that will not be effectual so long as the lease remains reversionary.

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I concur in all that has been expressed on the subject by my learned Brethren.

Judgment for the defendant on the two several demurrers.

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NOTE.—See also on the point decided in this case, *Lessee Peacock v. O'Grady* (13 Ir. Law Rep. 293); *Purcell v. Kirby* (*Ib.* 301.)



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## JEFFERYES v. LYSAGHT.

June 23.

*(Sittings in Banco, after Trinity Term.)*

Where the plaintiff stated in his plaint a certain agreement, and the defence contained allegations inconsistent with that agreement, but did not traverse it, and issues having been taken on those allegations the defendant offered in evidence another and a different agreement, to substantiate his defence:—  
*Held*, that (under the 68th section of the Common Law Procedure Act) he had admitted the agreement in the plaint mentioned, by not traversing it; and that the agreement sought to be relied on by him could not be admitted in evidence to controvert the former.

THIS was an action on a guarantee, and was tried at the Summer Assizes 1855, for the county of Cork, before the Right Hon. Judge Perrin. The summons and plaint stated that before the making of the promise or guarantee by the defendant, thereafter mentioned, one James Lysaght, the father of the defendant, had sold to the plaintiff certain lands called Cloheenmilcon, in the county of Cork, discharged of all tenancies or claims to occupation whatsoever, at and for the price or sum of £1500, to be paid by the plaintiff to the said James Lysaght, by instalments of £500 each, at three, six and nine months; and that at the time of said sale, one Jeremiah Murphy was a tenant of forty-three acres of the said lands, at the rent of £1 per acre; and thereupon, in consideration that the plaintiff, at the defendant's request, would pass to the said James Lysaght three promissory notes for £500 each, being the amount of purchase-money agreed to be paid by the plaintiff for the purchase of said lands, freed and discharged from all tenancies and claims to occupation whatsoever, and which three promissory notes the plaintiff did then, at the defendant's request, pass to the said James Lysaght for £500 each, the defendant, on the 19th of August 1854, undertook and promised the plaintiff to put the plaintiff, or any person appointed by the plaintiff, on the 29th of September 1854, into the actual possession of that part of the said lands then in the possession of the said Jeremiah Murphy; and in case of his not being able to do so, to compensate the plaintiff for any loss or damage he might sustain thereby, and to save the plaintiff harmless from all such loss or damage, such compensation to be at the same rate as the rent said Murphy had assumed: and the plaint further alleged that said Jeremiah Murphy, at the time of the making of said promise and undertaking by the defendant, was tenant to and occupied forty-three acres of

said lands, at the yearly rent of £1 per acre; and that said defendant did not put the plaintiff, or any person on the plaintiff's behalf, although frequently requested to do so, into the actual possession of said part of said lands so held by said Murphy, upon the 29th of September 1854, or at any time before the month of April 1855; but that the plaintiff was kept out of possession of that part of said lands up to and until the month of April 1855, and thereby lost all benefit and advantage therefrom: and the plaintiff further alleged that, in consequence of the breach by the defendant of said promise and undertaking as aforesaid, he was obliged to take, and did in fact take, proceedings to recover the possession of the said lands from said Jeremiah Murphy, after the said 29th of September 1854, and he thereby afterwards recovered the possession thereof; and by reason of such proceedings, the plaintiff had necessarily incurred costs and expenses to the amount of £11. 12s. 11d.; and further, that by the breach by the defendant, of his promise and undertaking aforesaid, the plaintiff had sustained damages to the amount of £54. 12s. 11d.

The defendant to this pleaded that there was no consideration for his undertaking and promise; for that previously to and at the time of the undertaking and promise, the plaintiff, under the terms of an agreement, dated the 26th of July 1854, and made between him and James Lysaght, mentioned in the plaint, being the agreement for the sale of lands in the plaint referred to, was, in consideration of the sale by the said James Lysaght to the plaintiff, of the said lands, actually bound to pass to the said James Lysaght the three promissory notes in the plaint mentioned; and that the plaintiff, in passing the three promissory notes as alleged, did no more than what he had agreed and was bound to do, previously to and independently of the undertaking and promise of the defendant.

The defendant also pleaded a second defence, containing matter not material to be considered in the present question. The issues taken, material to be now considered, were, first, whether there was any consideration for the undertaking and promise of the defendant? Secondly, whether the plaintiff was actually bound to pass to the

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 LYSAGHT. said James Lysaght the said three promissory notes, as alleged in the first defence? Thirdly, whether the plaintiff, in passing his said three promissory notes, did no more than what he had agreed and was bound to do, previously to and independently of the undertaking and promise of the defendant, as alleged in the said first defence?

At the trial, the plaintiff's attorney proved the execution by the defendant of a letter of guarantee, in the words stated in the summons and plaint, dated the 19th of August 1854; he also proved the execution by the defendant, for his father James Lysaght, of an agreement for the sale of the lands of Cloheenmilcon to the plaintiff, dated the 26th of July 1854. This agreement stated that the said James Lysaght agreed, in consideration of £1500, to be paid as hereinafter mentioned, to convey to said plaintiff or a trustee for him, within three months, a good legal title to the said lands, free from all incumbrances whatsoever, and to put the plaintiff into full and actual possession of the said premises, discharged of all tenancies by any person or persons whomsoever; and that the said James Lysaght was to accept payment of said consideration money in the following manner, viz., £500 within three months, £500 within six months, and £500 within nine months, said periods to be computed from the time said plaintiff should have been put into possession of the said lands as aforesaid, said sums to be secured in the meantime by the promissory notes of the plaintiff, payable with interest.

The plaintiff also tendered in evidence a deed of conveyance, dated the 31st of August 1854, of the said lands, from said James Lysaght to a trustee for the plaintiff, to which the defendant objected, but the learned Judge admitted it as evidence of the fact and time of its execution. This was the ground of the first exception.

The plaintiff's case having closed, the defendant's attorney and the defendant himself proved the execution by the plaintiff of a document, dated the 26th of July 1856 (being the same date as the agreement for the sale of the lands proved by the plaintiff). The defendant, on cross-examination, admitted his signature to the agreement proved by the plaintiff, and stated that plaintiff's attorney gave defendant what he (the plaintiff's attorney) said was an exact

copy of that agreement, and which was signed by the plaintiff. Counsel for the defendant then proposed to read in evidence this document of the 26th of July, so proved to be signed by the plaintiff. This document was an exact copy of the agreement for the sale of the lands proved by the plaintiff, except that it contained an exception of Jeremiah Murphy's tenancy, after the words "discharged of all tenancies whatsoever." Counsel for the plaintiff objected to this being read, as he relied on the summons and plaint, and the averment therein that the said James Lysaght sold the lands discharged of all tenancies whatsoever, and as the agreement proved by plaintiff established that averment, which was not traversed or put in issue; and he contended that the defendant should not be permitted to controvert that averment. And the learned Judge ruled that the said document could not be read in evidence, and refused to allow same to be read, whereupon the defendant excepted, and this formed the ground of the second exception. The learned Judge having charged the jury, they found the several issues in favour of the plaintiff.

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*Joshua Clarke* (with him *Sullivan*), in support of the exceptions.

The document we proposed to read would, at first glance, appear to be a duplicate of the agreement for the sale of the lands, proved by the plaintiff; it is admitted to be executed by the plaintiff, and is witnessed by the defendant's attorney. That document differs from the agreement proved by the plaintiff, in that it contains an exception and saving of Jeremiah Murphy's tenancy, after the words "discharged from all tenancies."—[GREENE, B. The consideration in question here seems to be that for the guarantee of August, and not that for the agreement of the 26th of July, which latter agreement is not the gist and foundation of the action; and the question then is, whether that agreement, not being the foundation of the action, is admitted on the pleadings as stated?—PENNEFATHER, B. The summons and plaint does not state any agreement in writing, but it states an agreement to give immediate possession of the lands, which is not traversed; you might have pleaded that you were not bound by that agreement to give immediate possession.]—We set

T. T. 1856. out in our defence the agreement and the date, and that plaintiff  
*Eschequer.* was bound by it to pass the notes; and it cannot be contended that  
 JEFFERYES we admit the mere recitals in the plaint, because we do not expressly  
 v. traverse them.  
 LYSAGHT.

As to the first exception. The deed of conveyance, of August 1854, was only offered for the purpose of showing that the agreement upon which the lands were sold was as set forth in the plaint, as that deed contained recitals to that effect.

*Brereton (with Exham), contra.*

The agreement stated in the plaint was a matter of fact, upon which the consideration for the guarantee rested. The words of the Common Law Procedure Act would be frustrated if this were not admitted (s. 68).

The other agreement produced by the defendant would have been a surprise on us if admitted, as we were unprepared by his pleading to meet it. There was no issue here as to whether or not the agreement was to the effect stated, or whether there was any other agreement, but the issues are framed upon the assumption that the agreement was as stated in the plaint.

As to the first exception. The deed was admitted only to show the time and fact of its execution; it was executed in pursuance of the agreement.—[PENNEFATHER, B. Why should the record be loaded with this deed if it be unnecessary, and the statement be admitted on the record?]

*Sullivan, in reply.*

If this were only an argumentative traverse of the agreement stated in the plaint, they should have demurred, but they have taken issues, and those issues are framed on the defence and the agreement stated in it.

PENNEFATHER, B.

This case has furnished a sample of the difficulty of acting under the recent Act of Parliament; but that difficulty may be solved, by attending closely to the provisions of the Act; these require that all

facts necessary for the defendant's defence shall be stated and set out in his pleading; and the 68th section enacts, that any facts stated in the summons and plaint, and which are not denied in the defence, shall be deemed to be admitted, for the purpose of the suit. Applying these principles to the present case, what ought to be the result? The summons and plaint stated that there was an agreement for the sale of the lands; that sale to be free of incumbrances, and that, in consideration of passing certain notes, the defendant promised to give to the plaintiff the complete possession of the lands. The Counsel for the defendant admitted that there was no direct traverse of the agreement stated in the plaint, but said it was impliedly traversed, because the consideration for passing the notes was alleged by the defence to be different from that stated in the plaint. The defendant, having in his possession an agreement altogether different from that stated in the plaint, supposed that the agreement in his possession was the only one in existence, and therefore did not think fit to traverse the agreement set forth by the plaintiff. In adopting that course, he took a course which was calculated to mislead the plaintiff, and evade the provisions of the Act of Parliament. When he found that he had in his possession an agreement, as he alleged, signed by the plaintiff, altogether different from that stated in the plaint, should he not in candour have stated this, and have said, that the agreement between the parties was not one for the transfer of the lands freed and discharged from the incumbrances of all tenants, but that there was an exception as to one tenant, who was confessedly in possession, and whose possession could not be interfered with, at least for a time? Surely this course should have been taken; and if it had been, an issue would have been taken and tried, which would have determined the question of what was the real contract between the parties. The real contract appeared very clearly from the defendant's own letter or guarantee, because by that letter he showed that there was a tenant in possession, and undertook, that if that tenant could not be immediately got out, he would indemnify the plaintiff against the consequences. The real merits of the case showed that there was such a state of things as did not warrant an agreement for the actual possession

T. T. 1856.

*Eschequer.*

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**T. T. 1856.** of the lands. How was the defendant to get out of this agreement?  
*Eschequer.*  
**JEFFERYES** He wanted to get in evidence an agreement, signed, as was alleged  
**v.** by the plaintiff, upon the 26th of July, by the allegation that there  
**LYSAGHT.** was no consideration for the undertaking mentioned, because by the  
 previous agreement it had been stipulated that the three promissory  
 notes should be given; but even there he did not make out his case,  
 because there was no stipulation stated with regard to the promissory  
 notes, or the time at which these notes should have been given;  
 and therefore, consistently with the case now attempted to be made,  
 there might have been full consideration for the promise in the  
 giving of the notes at once, instead of giving them upon different  
 occasions. It appeared, under these circumstances, very clearly to  
 the Court, that the substantial justice of the case was with the  
 plaintiff, and that the defence sought to be relied on was founded  
 merely on the technical ground of want of consideration; and if  
 there were a reliance upon the technical ground, the party must be  
 held strictly to the Act of Parliament. That Act precludes the  
 defendant, so far as I can see, from giving evidence of a different  
 agreement from that stated in the plaint, and admitted, because not  
 traversed, in the defence. The result is, we think this exception  
 must be overruled; as to the other exception, there has been no  
 case to show that this was ground for an exception.

RICHARDS and GREENE, BB., concurred.\*

Both exceptions overruled.

\* PRIOR, C. B., absent at Nisi Prius.

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#### MOORE v. O'DONNELL.

June 24.

A decree of an **Assistant-Bar-** **THIS** action was brought for assault and imprisonment without  
**rister under the** reasonable or probable cause. The defence pleaded was, that in  
 118th section  
 of the 14 & 15 Vic., c. 57, for execution against the person of the debtor, where the  
 debt is less than £10, is conclusive evidence that the notice has been duly indorsed  
 and served, as required by that section.

October 1854, defendant had impleaded the plaintiff by civil-bill process, before the Assistant-Barrister of the county of Limerick, at the Civil-bill Court then held for the Limerick division of said county, for the sum of £4. 0s. 8d., for goods sold and delivered, being respectively a sum and cause of action within the jurisdiction of the said Assistant-Barrister and the said Court; and the said civil-bill process was duly served upon plaintiff, being resident within said division; and the defendant caused a notice to be indorsed upon the said civil-bill, of his (the defendant's) intention to seek for a decree against the person of the plaintiff, at the original hearing of the said cause: and the defence then went on to state that the Assistant-Barrister, having competent jurisdiction, issued a decree against the person of the plaintiff, for payment of said debt and costs; and that the plaintiff was arrested and imprisoned under and in execution of the said decree, and which was the offence complained of. The plaintiff, to so much of the said defence as alleged that the defendant caused a notice to be indorsed upon the said bill, of the defendant's intention to seek for a decree against the person of the plaintiff at the original hearing of said cause, filed a replication, stating that the said notice was not so indorsed upon the said civil-bill process according to the statute in such case provided. To this replication, the defendant rejoined that the notice was so indorsed; and further, that the civil-bill process in the said cause was duly, and, according to the statute in such case made and provided, served on the plaintiff, he being, at the time of such service, usually resident in the said Limerick division, being the division of the said county of Limerick in which the Session at which the said cause was to be heard and determined was to be and was held, and being the division of said county where the said Court was held, at which the defendant was required to appear; and the said process was, by the oath of the process-server, in open Court, before the said Assistant-Barrister, satisfactorily proved (as the fact was) to have been duly served; and that it was also duly proved (as the fact was) that the house, in which the defendant was at the time of such serving duly resident, was situate within the said division where the said Court was held, at which the said plaintiff

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*Eschequer.*  
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was required to appear; and that such proceedings were had in said action, that the said Assistant-Barrister had jurisdiction and it was his function and duty to hear and determine the said cause, and to inquire and decide between the plaintiff and defendant in said cause whether the said notice had been duly indorsed upon the said civil-bill as aforesaid; and the said Assistant-Barrister did so inquire and decide between said plaintiff and defendant that such notice had been so duly indorsed on the said civil-bill; and that it is stated and averred, in and by and on the face of the said decree, and the record thereof remaining in said Civil-bill Court, that the said notice was duly indorsed on the said civil-bill as aforesaid, and the said decree and record on the face of them are good and valid, and show jurisdiction in the said Assistant-Barrister to make said decree; and that the plaintiff is therefore estopped and concluded from denying that the said notice was so indorsed as aforesaid.

Demurrer to the second paragraph of the rejoinder, upon the following grounds:—Firstly, that it contained no averment that the said notice was either annexed to or indorsed upon the civil-bill process, as by the statute required.

Secondly.—That the Assistant-Barrister had no jurisdiction to make a decree against the person of the plaintiff, unless said notice was annexed to or indorsed upon the said civil-bill.

Thirdly.—That the statement or averment on the face of the decree and the record thereof, to the effect that the said notice was duly indorsed on the civil-bill, is no proof of jurisdiction in the Assistant-Barrister to make a decree against plaintiff's person.

Fourthly.—That the decree and record being good and valid on the face of them, did not show any jurisdiction in the Assistant-Barrister to make said decree against plaintiff's person, as his jurisdiction depended on the fact of the indorsement of the notice.

*O'Mahony* (with him *D. Lynch*), in support of the demurrer.

By the 11 & 12 *Vic.*, c. 28, ss. 1 and 6, arrest was abolished in all cases where the debt was under £10. The Civil-bill Act allows the Assistant-Barrister to grant a decree against the person of the

defendant, where the sum demanded is under £10. 14 & 15 Vic., T. T. 1856. c. 57, ss. 116, 118; which last is the one under which the present proceeding has been taken. There is a difference in pleading the decrees of Courts between those of a superior and of an inferior jurisdiction, viz., that in the former, all things are presumed which were necessary for the foundation of the judgment; whilst in the latter, the jurisdiction must be specially averred and the fact proved: *Moravia v. Sloper* (a); *Herbert v. Cook* (b); *Morse v. James* (c); *Ladbroke v. Gyles* (d). The question is, whether the party to the cause should not justify under the record of the Court, and the whole record be produced? *Barker v. Braham* (e).—[PENNEFATHER, B. There is no doubt but that the party must produce the judgment.]—*Parson v. Lloyd* (f) shows that where a Court has no jurisdiction of the cause, the whole is *coram non Judice*, and that the defendant could not justify under a process, void for want of jurisdiction; therefore he must be admitted to show want of jurisdiction. Without the indorsement of the notice required by the 118th section, the Assistant-Barrister would have had no jurisdiction, and therefore that fact should have been averred and proved. In pleading the decree of an Inferior Court, nothing is intended in favour of the jurisdiction; but it must appear, by what is set forth on the record, that the Court had jurisdiction: *Sollers v. Lawrence* (g); *Read v. Pope* (h); *Lessee Coffey v. Rahilly* (i); *Gosset v. Howard* (k); *Davies v. Evans* (l). The judgment of a County Court in England is not conclusive, and the existence of the facts necessary to the regularity of such judgment is a question for the jury: *Thompson v. Blackhurst* (m). In *Condon v. Earl of Kingston* (n), it was held to be open to the defendant to show that the case was not within the jurisdiction of the Assistant-Barrister.

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(a) Willes, 30.

(c) Willes, 128.

(e) 3 Wils. 376.

(g) Ib. 416.

(i) 1 Jones, 274.

(l) 5 Ir. Jur. 275.

(b) 3 Doug. 101.

(d) Ib. 199.

(f) 3 Wils. 345.

(h) 1 Cr., M. &amp; R. 307.

(k) 10 Q. B. 359, 411.

(m) 1 Nev. &amp; M. 266.

(n) 7 Ir. Jur. 247.

T. T. 1856. *C. Barry* (with *Joshua Clarke*), contra.

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The 11 & 12 *Vic.*, c. 28, leaves the civil-bill jurisdiction untouched. The provision as to the indorsement of this notice is a direction to the plaintiff, and not to the Assistant-Barrister, for the foundation of his decree. In *Mr. Henn's* case, decided in the Queen's Bench this Term (*a*), the adjudication of the Grand Jury Sessions was upheld, notwithstanding the omission of the service of the notice on an occupier, as required by the 6 & 7 *W.* 4, c. 116, s. 55. The jurisdiction of the Assistant-Barrister did not depend on the indorsement; he had a general jurisdiction, and his decree is conclusive as to the fact of the indorsement having been made. In the next place, it is averred in the decree and in the record that the notice was duly indorsed. In *Thompson v. Blackhurst*, the marginal note differs from the judgment, as it was only in the case of Courts not of Record that the judgment was held not to be conclusive; but where there is a record it cannot be controverted: 2 *Smith's Lead. Cas.*, p. 608, citing *Rex v. Carlisle*, where Lord Tentarden says:—"The authorities are clear, that a party "cannot be received to aver as error in fact a matter contrary "to the record." The following authorities show that processes and orders, even of Inferior Courts, are conclusive, until rescinded, or avoided: *Brittain v. Kinnaird* (*b*); *Gray v. Cookson* (*c*); *Ackerley v. Parkinson* (*d*); *Re Clarke* (*e*); *Rex v. Mitton* (*f*); *Strickland v. Ward* (*g*); *Aldridge v. Haines* (*h*); *Ashcroft v. Bourne* (*i*); *Mould v. Williams* (*k*). These are nearly all magistrates' cases, and therefore, *a fortiori* cases, as a magistrate's order is not of record: *Ayrtown v. Abbott* (*l*). Section 97 of the last Civil-bill Act makes the Court of the Assistant-Barrister a Court of Record, and that record cannot be gone behind. Could it be gone behind, to show non-service of the civil-bill process? If the party be resi-

(a) Not yet reported.

(c) 16 *East*, 13.

(e) 2 *Q. B.* 619.

(g) 7 *T. R.* 681, n., 683, n.

(i) 3 *B. & Ad.* 684.

(b) 1 *Brod. & B.* 432.

(d) 3 *M. & S.* 411.

(f) 3 *Exp.* 200, n.

(h) 2 *B. & Ad.* 395.

(k) 5 *Q. B.* 469.

(l) 14 *Q. B.* 1.

dent in the jurisdiction, all other matters are to be inquired of by the Assistant-Barrister only, and his decision is conclusive as to those matters. The Civil-bill Act, section 105, provides that no proceeding shall be considered invalid on account of mere verbal or technical errors, and enables the Assistant-Barrister, or the Judge on appeal, to determine what is such.

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*O'Mahony*, in reply.

Regard must be had to the nature of the jurisdiction conferred by the Civil-bill Act on the Assistant-Barrister. His ordinary jurisdiction is to grant a decree against the person, for sums from £10 up to £40, where the parties reside in his jurisdiction; but the jurisdiction in the present case is an extraordinary jurisdiction, to punish fraud by arrest and committal to prison. The sections of the Civil-bill Act, as to this, must be read together; they are sections 116 and 117, and section 118 is a continuation of the 117th section.—[PENNEFATHER, B. I do not agree with that; the classes are quite distinct. The proviso at the end of the 118th section, that the debt shall not be extinguished, refers to those cases mentioned in the 117th section, where fraud has been committed; and in such cases the committal is to be for the period of three months, and does not extinguish the debt; but the proviso does not seem to refer to the cases provided for by the 118th section. The 118th section does not treat the power of arrest conferred by it as a punishment at all, but merely as a mode of execution, in place of that taken away by the 11 & 12 Vic., c. 28.]—By 8 & 9 Vic., c. 127 (the Small Debts Act), there must be the service of a summons, to show cause for default of payment of the debt, to warrant the jurisdiction; and where a debtor was arrested under that Act he obtained his discharge, because the warrant for his committal did not show that he had been summoned to show cause: *Re Kinning* (a); *Buchanan v. Kinning* (b); *Harper v. Carr* (c). They should plead both the judgment and the circumstances which gave jurisdiction.—[PENNEFATHER, B. Suppose a common-place pro-

(a) 1 Cox & Mac., Co. Ct. Cas., 16.

(b) *Ibid*, 504.

(c) 7 T. R. 270.

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ceeding against a person, where the cause of action had arisen within the jurisdiction, and it is stated before the Assistant-Barrister that the defendant has been served with the process, although he was not served in fact; and suppose a decree made by the Assistant-Barrister for a sum, say, for instance, £15, and that the defendant be arrested for that sum, would it be open to him to go behind the decree, and show that he was not served?—That is within the Barrister's ordinary jurisdiction.

PENNEFATHER, B.

We have heard this case very fully argued, and it does not appear to us that this is a matter of jurisdiction, strictly so called. Even if it were so, however, there is a great deal to be said in favour of the opinion that the decree of the Assistant-Barrister would be conclusive. The case of *Brittain v. Kinnaird* is an *a fortiori* case. That was a case in which a magistrate, having inquired into the facts, thought fit to exercise jurisdiction, and a conviction by him, assuming that jurisdiction, was held conclusive. That was followed by other strong cases, and which go a length beyond that to which we will go in the present case. It must be conceded, at all events, that there was a general jurisdiction in this case. As the law stood before the 11 & 12 *Vic.*, c. 28, the arrest of the defendant's person was the privilege of the plaintiff, in both the Assistant-Barrister's and in the Superior Courts. The Legislature then thought it unfit that, where the debt was under £10, the defendant should be liable to arrest, and accordingly made provision for the exemption of the debtor in such cases—not interfering with the jurisdiction of any Court, but merely directing that no execution should issue against the person, except in cases where the debt was over £10, and in particular cases of personal injuries. This was thought inconvenient where dealings should take place between persons of an humble position in life; and accordingly, the 14 & 15 *Vic.*, c. 57, referring to the provisions of the 11 & 12 *Vic.*, c. 28, provides three classes of cases where the plaintiff may proceed against the person of the debtor.

The first class is where the plaintiff has obtained a decree T. T. 1856.  
generally, when the Assistant-Barrister may bring the person of *Eschequer.*  
the defendant before him, to inquire whether he has any means **MOORE**  
or expectation of paying the debt, and if he have not, then to **v.**  
issue a decree for execution against his body. The second, where **O'DONNELL.**  
the defendant has incurred the debt fraudulently, or under false  
pretences; in which case the Assistant-Barrister may order his  
committal as a punishment; and a proviso is added, that that  
committal shall not operate as an extinguishment or satisfaction  
of the plaintiff's debt. Then the third class is, where the plaintiff  
at the original hearing of the cause thinks it for his benefit that  
he should have execution against the person of the defendant;  
and then he may, by notice indorsed upon the civil-bill, signify  
his intention to seek for such a decree; and the Assistant-Barrister  
is thereupon empowered to issue a decree against the person of the  
defendant. The indorsement of the notice is directory on the  
plaintiff; and we must assume that the Assistant-Barrister, before  
making his decree for the arrest of the defendant, was satisfied  
not only with the service of the process, but also with the in-  
dorsement of this notice; and he has the same jurisdiction in  
determining the one and the other. Would it not be strange that  
the one fact might be inquired into, and not the other? He must  
be considered as entrusted with the determination of the fact of  
the service of this notice as well as of the process; and we cannot  
conclude that he would permit the arrest to be made, unless he  
was satisfied that all the requisites had been complied with.

The case of Mr. Henn, in the Queen's Bench, which has been  
cited to us, bears closely on this; where the Court of Queen's  
Bench held that, the Grand Jury Sessions having proceeded to their  
adjudication, their jurisdiction could not be questioned, although  
it was stated that no notice was ever served, and although that  
notice was what conferred the jurisdiction; because the Sessions  
had a right to determine the existence of their own jurisdiction,  
and to inquire into those matters which gave them that jurisdiction.  
Is not this a stronger case than that of the present, where the

**T. T. 1856.** *Assistant-Barrister* had authority to inquire whether the notice *Eschequer.* required was served?

**MOORE**  
**v.**  
**O'DONNELL.** We, therefore, think this decree of the Assistant-Barrister is to be attended to in every respect, as much as a judgment of the Superior Court, except as to matters concerning the extent of his jurisdiction.

**RICHARDS, B.**

The liability of the defendant to arrest, where the debt is under £10, having been taken away, we find the 118th section of the Civil-bill Act reserving to the Assistant-Barrister (notwithstanding the former Act) the right of issuing execution against the person of the defendant in such cases; and the Civil-bill Act provides that where a certain execution is sought, the plaintiff shall cause a notice to be annexed to, or indorsed upon, the civil-bill, of his intention to seek that execution.

Now this saves the question of the jurisdiction of the Assistant-Barrister. If a proper application be made to him, is it not his duty to satisfy himself that all the requisites of the statute have been complied with, and to inquire whether this notice has been served or not? Suppose he comes to the conclusion that the notice was not served, his decree will be according to that fact. Suppose, on the other hand, he thinks it was served, and makes his decree accordingly, is that fact to be controverted in any other Court? It is clearly a matter to be decided by him, on the evidence before him. I think that this was a decree of the Assistant-Barrister with reference to matter clearly within his jurisdiction, and that his decree must be considered conclusive as to the matters before him; and therefore, I think, the rule pronounced by my Brother PENNEFATHER, is the correct one.

**GREENE, B.**

The rejoinder alleges that the cause of action arose within the jurisdiction; that the residence of the plaintiff here was within the jurisdiction; and the due service of the process. This would be perfectly sufficient to give jurisdiction to the Assistant-Barris-

ter; and if so, he had a right to adjudicate on the facts of the case. By the Civil-Bill Act he is empowered to give one or other of two judgments—one against the person, and the other against the goods of the defendant. In order to warrant him in giving a judgment against the person, he must inquire into the fact of the requisite notice having been served; and, according to what is alleged by the rejoinder, he did so.

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This demurrer in effect seeks to establish that this Court must go behind the record: we cannot do so; and the decree, being upon matter within the jurisdiction of the Assistant-Barrister, is conclusive, and therefore this demurrer must be overruled \*

\* PIGOT, C. B., *absente*.

### PIERCE v. ELLIS.

M. T. 1856.  
Nov. 22.

ACTION for slander and libel.—The summons and plaint contained four causes of action; the two first for slander, for words spoken of plaintiff by the defendant, at a meeting of the guardians of the poor of the Newcastle union. The third and fourth causes of action were for libel, by publishing the words complained of in a

Action for a libel, published by the defendant in a newspaper.

The defendant pleaded that he was a guardian of the poor of a

certain union, and at a meeting of the board of guardians of that union a discussion arose in reference to the plaintiff, and that speeches were made by several of the guardians, including the defendant, and by the plaintiff on his own behalf, and that the defendant spoke in discharge of a public duty, without malice, &c.; also, that in order to assist the newspaper reporter, who attended for the purpose of reporting the proceedings, to publish a correct account of them, he handed to him a correct report of his own speech, and that the proprietor of said newspaper published, without any communication with the defendant or his consent, a portion of said speech only.

*Held*, as to the first defence, that the defendant was not privileged, as it appeared on the defence itself, that the report of the proceedings was not a fair one; the speeches of the other guardians, or of the plaintiff himself, not having been given.

*Held also*, that if the privileged occasion failed, the denial of malice did not constitute a defence.

*Held*, as to the second defence, that the defendant was responsible for the fair publication of the proceedings, when he gave a report of his own speech for publication.



M. T. 1856. newspaper called "The Munster News and Provincial Advertiser."  
*Eschequer.*

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v.  
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To the third cause of action the defendant pleaded (amongst others) the following defence, viz.:—That a certain public meeting was held by the guardians of the said Newcastle union, in performance of their duties and exercise of their powers as such guardians, and according to the statute in such case made and provided, for the transaction of the public business of said union, and the discussion of questions concerning the administrations of the affairs of said union, and for taking the opinions of said guardians upon such questions; and, amongst other proper and legitimate subjects of discussion at said meeting, there was duly brought before and discussed at said meeting a question respecting the amount of salary to be paid to the plaintiff, as medical officer of said union, which was then and there a proper question for said guardians to discuss, and which they were bound as such guardians to discuss at said meeting, and express their opinion and decide thereon; and the plaintiff attended at said meeting, and took part in said discussion of said question, and was heard by said guardians on his own behalf, and divers guardians then and there made statements or speeches expressive of their respective sentiments or opinions respecting the question so under discussion as aforesaid; and amongst others, the defendant, who was then and there a guardian of said union, and as such acting and attending at said meeting, made a statement or speech expressive of his sentiment and opinion respecting said question; and the defendant made said statement or speech in the performance of his duty as such guardian, *boné fide*, without malice, believing the facts stated by him to be true, and on a lawful occasion, and under such circumstances, and in such manner in all respects, as rendered said statement or speech a privileged communication, and in no way slanderous or actionable; and the defendant says that the reporter of the public newspaper, in the fourth paragraph of the summons and plaint mentioned, attended at said meeting for the purpose of fairly and correctly reporting in said newspaper (as was lawful to do) the proceedings and legitimate discussions of said public meeting, for

the information of the poor-rate payers of said union and the public at large; and the said reporter, in order to enable him to report fairly and correctly (amongst the other proceedings of said meeting) the said statement or speech of the defendant, and to save said reporter the trouble of reporting the same himself, requested the defendant to give to him, said reporter, a correct report of said statement or speech, which the said defendant accordingly did; and the defendant says that he did give said report to the said reporter *bonâ fide*, without malice, which report is the alleged libel in said third paragraph mentioned, and the giving thereof to the said reporter in manner aforesaid is the composing and publishing in said third paragraph mentioned.

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To the fourth paragraph the defence pleaded was, that the defendant, referring to the statement in the said last preceding defence contained, as if the same were repeated here, says that the alleged libel in said fourth paragraph mentioned is a portion of the said report so given by the defendant to the said reporter as aforesaid; and the composing and publishing, in said fourth paragraph mentioned, is the publication of said portion in said newspaper by the proprietor thereof, who, of his own accord, and without any communication with the defendant, or consent or knowledge on his part, selected and published in said newspaper such portions only of said report as said proprietor thought fit.

Demurrer to each of these defences.—Because the matters and things set forth therein respectively do not disclose any lawful occasion for the publication of the said libel therein respectively mentioned; and as to the last of the defences, further, because it does not confess and avoid or traverse the publication of the libel in the fourth paragraph complained of.

*Joshua Clarke* (with him *T. R. Henn*), for the demurrer.

The case of Members of Parliament being privileged is exceptional, and is at all events confined to their speeches in the House, and does not extend to the publication of them.

These proceedings before the board of guardians are not privileged as public proceedings; and even if they were so, it is settled,

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 ELLIS. that the publication of a part only is not privileged; and a defamatory speech of Counsel may not be published, even with the evidence on which it is founded: *Saunders v. Mills* (a). It is not alleged in this defence that the report was a full and true one of the proceedings; but only that the reporter attended for the purpose of making a full and true report, and asked the defendant for his speech, which he accordingly gave.

The *Attorney-General* and *C. Barry*, contra.

There is no similarity between the case of a member of the House of Commons and the present case; the former is a personal privilege in the House, regardless of his duty.

Proceedings in Courts of Justice may be published: *Hoare v. Silverlock* (b); *Andrews v. Chapman* (c); *Smith v. Scott* (d); and this privilege ought to be extended to other public proceedings in which the interest of the public is involved. Here the public, who are rate-payers, have an interest. The defence avers this to be a public meeting. There is no difference between the printer and the speaker, who gave the report to the printer. Defamatory words, spoken by a Counsel in a cause, pertinent to the matter in issue, are not actionable: *Hodgson v. Scarlett* (e).

This was not an *ex parte* proceeding, as it is stated the plaintiff appeared at the meeting, and took part in the discussion, and was heard in his own behalf.

The defence avers that the statement complained of was made *bonâ fide*, without malice, believing the facts stated by him to be true. This averment alone would be sufficient to sustain the defence on a general demurrer. Upon the general issue, under the New Rules in England, of 1853, which are an almost *verbatim* copy of the Rules of 1832, the following three things may be disproved:—first, the fact of the publication; second, that the publication was malicious; and third, that it was used in the defamatory sense imputed. Now this is so, because the general

(a) 6 Bing. 213.

(b) 9 Com. B. 20.

(c) 3 Car. & K. 286.

(d) 2 Car. & K. 580.

(e) 1 B. & Ald. 232.

issue is a traverse of malice. In *Davis v. Reeves* (a), the defendant, under a traverse of malice, was allowed to prove a privileged occasion. The other circumstances stated may be rejected as surplusage, and we may proceed on the issue of malice, and prove privilege. The issue of malice puts us to prove all the circumstances over again.

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As to the general grounds of this defence.—A privileged occasion is made out by the facts alleged. The reporter attended to report the entire of the proceedings, and asked for the speech.—[PENNEFATHER, B. The reporter only published the defendant's speech; this, therefore, is not a full report of the proceedings, and such as the reporter could defend; and how can the defendant be in a better position than the reporter?—Assuming that that the reporter was entitled to publish the whole of the proceedings fairly, and supposing two or three reporters to be employed, would all of them be liable for the publication of a garbled portion? If not, then the defendant here has put himself in the position of a reporter, and his object was to aid the publication of a full report, and so he states in the plea.—[PENNEFATHER, B. He does not say he gave it to the reporter on the understanding that a full report of the proceedings should be published; he could not be justified in giving his speech alone, but only (if at all) by giving it as part of a whole.]—Suppose a third person to take it down for the reporter, whilst the latter was out of Court for a few minutes, and to give it to him, would he be liable for its publication? *Rex v. Creedy* (b) is distinguishable from the present case; for in the first place, the publication there was not part and parcel of a newspaper report, but a subsequent report, not in ordinary course. If the defendant had gone to the proprietors afterwards, and for his own purposes had asked them to report his speech, then I admit he would be liable. *Rex v. Abingdon*, referred to by Lord Brougham, in *Rex v. Wright* (c), where he gives the correct version of the former, stands on the same footing. If the full report would have been privileged, the party contributing cannot be liable for its incompleteness.—

(a) 5 Ir. Com. Law Rep. 79.

(b) 1 Man. & S. 273.

(c) 8 T. R. 293.

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 ELLIS. is shown in *Delegall v. Highly* (a); *Andrews v. Chapman* (b).

*T. R. Henn*, in reply.

*Harrison v. Burke* (c). Lord Campbell there lays down the following canon: "A communication made *bona fide*, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminating matter, which, without this privilege, would be slanderous and actionable."

The proceedings of a board of guardians do not affect the public: *Charlton v. Walton* (d); *Stockdale v. Hansard* (e). The language of Counsel, as such, is not to be afterwards published, without publishing the evidence to support it: *Rex v. Creevy* (f); *Roberts v. Brown* (g); *Lewis v. Walter* (h).

PIGOT, C. B.

In this case we are of opinion that the demurrer to each of the two defences must be allowed.

The first of these defences (the ninth in the order of pleading) is pleaded to the third paragraph of the plaint, and states, that at a meeting of the guardians of the poor of the union, mentioned in the plaint, held for transacting the public business of the union, the defendant, as one of the guardians, attended; that, among the questions there discussed, was one respecting the amount of the salary to be paid to the plaintiff as medical officer of the union; that this was a proper question to be discussed by the guardians, and one on which they were bound to express their opinions and to decide; that the plaintiff attended the meeting, took a part in the

(a) 8 Car. & P. 444.

(c) 25 L. J. 28.

(e) 9 Ad. & El. 1.

(g) 10 Bing. 519.

(b) 3 Car. & K. 286.

(d) 6 Car. & P. 385.

(f) *Ubi sup.*

(h) 4 B. & Ald. 605.

discussion, and was heard on his own behalf; that divers guardians made statements and speeches expressive of their respective sentiments and opinions on the question so under discussion; that amongst others, the defendant made a statement or speech, respecting that question; and that he made such statement or speech in the performance of his duty as such guardain, *bona fide*, without malice, and believing the facts stated by him to be true, and "under such circumstances and in such manner in all respects as rendered it a privileged communication." The defence then states that the reporter of the public newspaper, mentioned in the fourth paragraph of the plaint, attended the meeting, for the purpose of fairly and correctly reporting in said newspaper (as was lawful for him to do) the proceedings and legitimate discussions of said public meeting, for the information of the poor-rate payers, and the public at large; and the reporter, in order to report fairly and correctly (among the other proceedings at the meeting) the statement or speech of the defendant, and to save the reporter himself the trouble of reporting same, requested the defendant to give him a correct report of his speech, which the defendant accordingly did, *bona fide*, and without malice; and the defence concludes with an averment that this report was the libel complained of in the third paragraph of the plaint; and that the composing and publishing there mentioned were the giving of the report to the reporter in manner aforesaid.

The tenth defence is pleaded to the fourth paragraph of the plaint; and states that the alleged libel was a portion of the same report given to the reporter as mentioned in the ninth defence. And after referring to the ninth defence, it states, that the composing and publishing complained of in the fourth paragraph were the publication of that portion, in the newspaper mentioned in the plaint, by the proprietor thereof, who, of his own accord, and without any communication with the defendant, or consent or knowledge on his part, selected and published in said newspaper such portions only of said report as the said proprietor thought fit.

To each of these defences the plaintiff demurred. Towards the close of the argument on those demurrers, it was contended, for the defendant, that the denial of malice in each defence constituted a

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complete answer to the paragraph of the plaint to which it was pleaded; and that this being admitted by each of the demurrers, the defendant was entitled to judgment. We intimated, in the course of the discussion, that it was impossible to maintain the defences on this ground. According to the decision in *Dixon v. Franks (a)*, founded on the 56th section of the Common Law Procedure Act, the defendant in an action for libel or slander, who rests his defence upon the ground that the defamatory matter was published upon an occasion which made it privileged, must set forth the facts which constitute the occasion. He must also aver that the publication was without malice. The defence is in every such case compounded of two statements: first, that the defamatory matter was published on the occasion alleged; secondly, that in the publication, on that occasion, there was no malice. The facts which constitute the occasion are a necessary part of the defence; for if they do not confer privilege, the inference of law, that defamation is malicious, is not rebutted; and that being so, the defendant is precluded from denying malice, which the law then implies. The effect of yielding to the argument with which I am now dealing would be, to sanction an easy mode of avoiding the rule laid down in *Dixon v. Franks*. The result would be, that a defendant might in form comply with the rule, by setting forth one set of facts as the ground of privilege, coupled with a denial of malice; and then, upon an issue taken on the denial of malice, might prove any other set of facts establishing privilege, at the trial; for the whole of this argument is based upon the assumption, that the statement in the defence, of the facts relied on as creating privilege, is immaterial, since malice is denied. In the case of *Wenman v. Ashe (b)*, the jury found that there was no malice in the words, which were spoken on an occasion which, the defendant contended, conferred privilege: the question was reserved for the Court, whether, notwithstanding that finding, the plaintiff was entitled to a verdict? The Court determined that he was; holding, that the facts proved conferred no privilege, and treating the finding negating malice as immaterial, since the libel complained of was not published on an occasion from which any

(a) 7 Ir. Jur. 239.

(b) 13 C. B. 836.

privilege was derived. That is a direct authority against the argument that the allegation of facts creating privilege is immaterial, if malice be denied. I confess I should have been better satisfied if the Court could have taken a different view of the Act of Parliament, and could have avoided laying down the rule applied in *Dixon v. Franks*; because I am well aware of the difficulty which in many cases exists in setting forth accurately, and without risk of failure, from a variance between pleading and proofs, the particular facts on which the privilege arises; and because it is a defence which, when honestly made, ought, in my opinion, to be favoured. The case of *Dixon v. Franks* appears to have been decided on the ground that the 56th section of the Common Law Procedure Act made it imperative on the defendant to set forth the facts constituting the occasion relied on as conferring privilege, in his defence. We did not depart from that rule in *Davis v. Reeves*. Upon the new trial motion in that case, the objection to the form of the defence was not open to the plaintiff: both parties chose to go to trial upon an issue which we held to be, in effect, similar and equivalent to that of the general issue according to the old forms of pleading; and we consequently determined, that the defence of privilege was, upon that issue, open to the defendant at the trial.

The propositions mainly contended for in support of the defences were; first, that the publication of the proceedings of a board of guardians was privileged, in the same manner as the publication of proceedings of a Court of Justice; and secondly, that the alleged libel, in the present case, was within the privilege which belongs to such publications.

Even if the first proposition were well founded, it would, in my judgment, be impossible to sustain the second. As to the proceedings in Courts of Justice, there are several authorities, including especially the cases of *Hoare v. Silverlock* (a), and *Andrews v. Chapman* (b), which lay down the rule, that (with certain qualifications) the publication of a fair, *bona fide* and impartial report of such proceedings is justifiable, and cannot be successfully made the

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(a) 9 Com. B. 20.

(b) 3 Car. &amp; Kir. 286.



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subject of an action for libel. That rule has been held not to apply to proceedings which are in their nature *ex parte*; as proceedings before a magistrate, charging a party with an offence for the purpose of making him amenable for a future trial: *Duncan v. Thwaites* (a). And a report of judicial proceedings, injurious to reputation, can have no protection if it contains a partial or unfair representation of those proceedings: *Flint v. Pike* (b); *Saunders v. Mills* (c). The case last cited is an authority for saying, that if the proceedings in the case before us had been proceedings in a Court of Justice, and a speech of Counsel, delivered in those proceedings, and injuriously reflecting on the plaintiff's character, had been reported, while the evidence or statements which would have answered or qualified the imputations were suppressed, the publication would have been without privilege, and an action could be maintained for it. The defence states that there was a discussion at the meeting, respecting the defendant's salary; that the defendant was "heard on his own behalf;" and that several of the guardians "made speeches expressive of their *respective opinions*." The fair import of these averments is, that a discussion took place, in which opposite opinions were expressed by different guardians, and that the defendant himself made statements in his own favour. The defence does not allege that the report, as published, was a full or a fair one. It states that the reporter attended at the meeting *for the purpose* of making a fair and correct report of the proceedings, and that the defendant gave him a correct report of his speech; but it does not aver that the purpose of the reporter was effected, or that a fair or correct report of the proceedings was made or was published.

I think we ought, in the absence of any such allegation, to treat the case as one in which the defendant's speech only was reported; for we cannot assume what he has not alleged. I think we must also assume, upon the averments which the defence contains, that statements not published in the report were made, in the plaintiff's favour, by some of the other guardians, or at all events by the

(a) 3 B. &amp; Cress. 556.

(a) 4 B. &amp; Cress. 473.

(c) 6 Bing. 213.

plaintiff himself. And if the analogy contended for existed, between proceedings of such a body as a board of guardians, and those of a Court of Justice, there would thus appear, in this report, a partiality and unfairness which would deprive the defendant of any protection on that ground.

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It was contended, in the argument, that if a fair report had been published, and if such publication were privileged, the defendant would be justified in giving the report of his speech for the purpose of that fair publication, which would thus be privileged; and that if he would be so justified at the time of giving to the reporter a copy of his speech, he cannot be afterwards made liable to an action for the default of the reporter, or of the publisher, in publishing a partial and defective report of the proceedings. The answer to this argument is, that the publication complained of became a libel *when it was published*, and that the defendant, who supplied the document that was so published, must be held answerable for the consequences of his own act. When he assumed the character of a reporter of his own share of the proceedings, he should have taken care that the defamation which it conveyed should (so far at least as related to the defendant) be accompanied by a fair account of the entire.

I have hitherto dealt with the case upon the assumption, that the analogy contended for existed between reports of the proceedings of boards of guardians, and those of proceedings in Courts of Justice. The defences being unsustainable upon that assumption, it is unnecessary to decide whether such analogy exists. I think it right, however, to say, that no authority has been cited for such analogy. That the public have an interest in what passes at meetings of boards of guardians, cannot be disputed. It is also, in my opinion, clear, that for what is said by any guardian at a meeting of the board, in the fair and *bona fide* discharge of his public duty, and without malice, he cannot be made responsible in an action for oral slander; but a difference, great and obvious, exists between their proceedings and those of Courts of Law, in reference to some, at least, of the grounds on which the publication of fair reports of the latter are generally held to be privileged. Courts of Justice are

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open to all the public who can conveniently be accommodated within them; the public have a right to be admitted to witness their proceedings. In the language of Lord Campbell, in *Andrew v. Chapman (a)*,—"The Courts are open to all, but they are of "limited extent, and only a small number of persons can be present "in them; but by means of the press, the whole nation is informed "of what takes place, and is put in a position to form an opinion "upon the conduct of the jury, the Judge, and the witnesses." No such right exists of being admitted to witness the proceedings of boards of guardians; they have the power of deliberating (I believe rarely exercised, and, I believe, the rarer the better) with closed doors. Again, every Court of Justice has some presiding authority, with ample power to maintain order, and to control, within due bounds, the discussions which take place before it. The guardians have no presiding authority, save that of the chairman, with very limited powers. It is obvious that, in such a body, discussions and accusations may take place altogether *ex parte*, and may be made the medium of the most injurious charges against individuals in their absence, without inquiry, without even adequate means of instituting inquiry, or of enforcing the production of proofs, and without any presiding authority having sufficient power to control or direct the proceedings. One of the grounds on which the Court of King's Bench in England, in *Duncan v. Thwaites*, held the report of preliminary proceedings before magistrates not privileged, was (in the language of Lord Tenterden, 3 *Barn. & Cress.*, p. 583), that those proceedings were "of a kind which they may lawfully conduct *in private*, whenever they think fit to do so." The public had plainly an interest in the proceedings had under the commission to inquire into the municipal corporations of England, which was issued with a view to subsequent legislation; yet it was held, in *Charlton v. Wilson (b)*, by Mr. Justice Patteson, that proof that the publication complained of as a libel was a true report of proceedings before one of the commissioners under that commission, afforded no defence to the action.

The next defence is pleaded to the fourth paragraph of the plaint

(a) 3 *Q. B.* 288.

(b) 4 *C. & P.* 355.

which contains a part only of the defamatory matter set forth in the third paragraph. I have already stated the difference between those defences. It has been argued that the publication stated in the tenth defence, and admitted by the demurrer, being the publication of the proprietor of the newspaper, selecting and publishing, without the defendant's privity, a part only of the report of the speech furnished by the defendant, the defendant is not responsible. This argument is answered by the decision in the case of *Tarpley v. Blabey* (a), in which a state of facts appeared on a trial similar in effect to that set forth in this defence. It was there held that the omission, in a newspaper, of certain portions of a libellous letter written by the defendant, and found in the house of the editor, did not disentitle the plaintiff from relying, in an action for libel, on those passages of the letter which were published in the newspaper, although it was contended that the editor alone was responsible for the publication. Lord Chief Justice Tindal, in his judgment, says:—"If the defendant authorised the printing of the libel in its larger and more offensive form, he gave the minor authority to print the less offensive parts of it. The case would be different if any qualifying expressions had been left out; but that was so far from being the case, that the printer, manifestly for his own security, had omitted only the most hazardous passages." It is not alleged, in the case before us, that the meaning of the portions published was qualified by what was contained in the portions withheld. The tenth defence must therefore abide the same rule as the ninth; and consequently the demurrer to each must be allowed.

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PENNEFATHER, B.

It is almost unnecessary for me to add anything to the judgment of my LORD CHIEF BARON, in which I most fully concur; but I may state that our judgment does not proceed on the ground of its not being lawful to publish a full account of the proceedings before the board of guardians. It is quite plain that a report of the proceedings of Courts of Justice must be full and true; and perhaps it may be considered that if it goes on to state the speeches of

(a) 2 Bing. N. C. 437.

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Counsel, everything relating to any slanderous matter therein contained must be inserted. We are not called on to decide the point, as to whether the proceedings before the board of guardians are to be judged of in the same manner, because clearly in the present case there has been no true report of what passed before the guardians, but the speech of the defendant has been alone reported and published. Is that a fair and true report, even if the privilege contended for could, on the grounds on which privilege is rested, be extended to proceedings in the board-room? The report in the present case fails to be a full and true account of the proceedings, and on this account it cannot be sustained. Mr. Barry argued very much that the traverse of malice was sufficient to let in a full defence of the case. The defence consists of two things—a privileged occasion, and absence of malice. The occasion is lawful, if actual malice be absent and privilege exists; but the absence of actual malice will not be sufficient to excuse the publication without privilege; the two must concur; and it is quite a mistake to suppose that the rule requiring facts to be stated is dispensed with by the introduction of a plea traversing malice.

GREENE, B., concurred.\*

[On the application of the plaintiff, he was then allowed to withdraw the traverse of actual malice.]

\* RICHARDS, B., absent.

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## MOSELY v. M'MULLEN.

June 3.

THIS was a motion that the second and third defences of the defendant in this cause might be set aside and struck out, as calculated to prejudice, embarrass and delay the fair trial of the action. The summons and plaint contained two counts, one for goods sold and delivered, and the other for goods bargained and sold. To this, the defendant, having obtained leave from GREENE, B., in chamber, to plead double matter, pleaded as follows:—First, a traverse of the sale and delivery and of the bargain and sale.

Secondly—That the only sale and delivery or bargain and sale of goods, by the plaintiff to the defendant, was as follows; that is to say, the said plaintiffs, being possessed of a certain cargo of Indian corn at Queenstown, in Ireland, on board a certain ship called "The only son"—the defendants, in the city of Dublin, made to certain agents of the plaintiffs, and through them to the plaintiffs, an offer for the said cargo, in the following terms; that is to say, thirty-three shillings for 480 lbs., in good condition, cost, freight and insurance; payment on quantity being ascertained, cash, less two months' interest from the date of sale, at £5 per cent. per annum; which offer the said plaintiffs accepted, and thereupon ordered the said vessel to be forwarded to Dublin; that on the arrival of the said vessel in the port of Dublin, the said cargo of corn was in a warm state, and required to be discharged from said vessel, and to be spread upon lofts, for the purpose of cooling, and for the due inspection and examination thereof, before it could be ascertained whether any, and if any, how much thereof, was in good condition; and that accordingly a certain quantity, to wit, 1078 quarters, of the said cargo was so discharged, and was properly deposited, partly upon lofts of the said defendants, and partly upon lofts of J. M., being fit and proper places for the cooling and due examination thereof, and was so placed for the purpose of being

In an action for goods bargained and sold, and sold and delivered, a special defence, stating that the contract was made on certain conditions not complied with, is unnecessary, as that defence may be given in evidence under a mere traverse or denial of the contract.

*Semble*—however, that such a special plea is proper, and will not be set aside as embarrassing.

The 56th section of the Common Law Procedure Act, which requires the special matter of the defence to be expressly pleaded, refers to the pleading of new facts, or facts extrinsic to the plaintiff's case.

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Exchequer. ascertained, and of having so many quarters thereof as should, upon  
**MOSELY** such examination, be in good condition, delivered to the said de-  
**v.** fendants, pursuant to the contract for sale in this defence men-  
**M'MULLEN.** tioned. That within a reasonable time after the said corn was so  
deposited for the purpose aforesaid, the said defendants gave due  
notice to the said plaintiffs that said corn was not in good condition,  
and called upon the plaintiffs to have same duly examined; and  
if any part thereof was in good condition, that the defendants  
were ready to take and pay for the same, so soon as the quantity  
thereof should be ascertained. That no part of said cargo was  
ever ascertained, or ever was, in fact, in good condition, according  
to the said contract, and that the said defendants rejected the same,  
as they lawfully might, whereof the said plaintiffs had due notice;  
and that the said corn still remains in said stores for the use of  
the plaintiffs, and has been so remaining ever since the same was  
so deposited; and that no part of the said corn ever was delivered  
to or accepted by the said defendants, and that the said corn is  
the same goods as in the summons and plaint mentioned.

The defendants pleaded a third plea, of the substance of the  
plea, generally, and in shorter terms.

*Macdonogh*, in support of the motion.

These pleas are embarrassing, as containing an argumentative de-  
nial of the cause of action, and not framed expressly either in traverse  
or in confession and avoidance. The proper mode of pleading in  
confession and avoidance is to admit the whole statement of the  
cause of action, and afterwards to avoid it: *Broomfield v. Smith* (a);  
and the Common Law Procedure Act, s. 70, requires the same mode  
of pleading to be observed. By the New Rules in England, the plea  
of non-assumpsit is narrowed to a denial of the contract; and yet  
under that plea, the special matter here pleaded may be given in  
evidence; so that this defence amounts in fact to no more than  
a denial of the contract: *Jervis's Rules*, p. 126; *Groomsell v.*

(a) 1 M. & W. 542.

*Lamb* (a); *Alexander v. Gardiner* (b); *Cousins v. Paddon* (c); *Hayselden v. Staff* (d); in which last case a special plea, showing that the terms of the contract were not complied with by the plaintiff, so that the cause of action never arose, was held bad, as not confessing and avoiding, but, in fact, amounting to an argumentative denial of the debt:

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**M'MULLEN.**

*G. Fitzgibbon* (with *Kernan*), contra.

Under the 56th and 69th sections of the Common Law Procedure Act, a general plea of denial of the contract would be bad. In *Executors of Boake v. M'Cracken* (e), in the Common Pleas, where the Court was divided in opinion, Judges Jackson and Torrens held that the matter of the defence, which was precisely similar to the present, should be expressly pleaded. In *Butler v. Strickland* (f), in the Queen's Bench, this Term, a similar motion was refused.—[GREENE, B. There are two points in this case; first, whether this plea is necessary at all? secondly, whether, although it be necessary, the plea be objectionable as embarrassing to the plaintiff? it may embarrass, though proper to be pleaded. I gave liberty to plead double, as I thought it doubtful, under the 56th section, whether defendant should plead the facts or plead generally.]—The plaintiff might prove the delivery which has, in fact, taken place, which the Judge at the trial might think sufficient for his case against us, unless we were to plead explaining that delivery, by showing its qualifying conditions; and we ought not to peril our case by omitting to do so.

*Macdonogh* replied.

By consent of the parties, the following order was made :—That the second and third pleas be set aside, the plaintiff undertaking not to object to the special matter thereof being given in evidence, and he to be at liberty to meet same by further evidence, if he should think fit.—Costs in the cause.

(a) 1 M. & W. 352.

(c) 2 Cr., M. & R. 547.

(e) 1 Ir. Jur., N. S., 207.

(b) 1 Scott, 281.

(d) 5 Ad. & El. 153.

(f) Not yet reported.



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Although it has now become unnecessary that the Court should decide upon the points in this case, yet I think that we are called upon to express our opinion upon them, in consequence of the present doubtful state of the authorities. I entertain a strong opinion that the entire of what is set forth in this plea could have been given in evidence upon a simple denial. There was no complete sale; it was a sale upon condition, which, if not performed, there was no performance of the contract. The principle of law is perfectly clear, that, if there be a conditional sale, and the condition be performed, it is a complete contract; but if not, the contract is incomplete. In those cases where formerly an action of *indebitatus assumpsit* would have lain, the liability of the defendant arose only on the completion of all the facts which created that liability, and the facts which established that the goods were sold and delivered comprised all those circumstances, which made it a complete contract. It appears very clear, that, on a traverse of the sale and delivery, there is a traverse of all that amounts to a sale, and all that amounts to a delivery. It is stated in the defence that this was a contract for the sale of goods, which contained the following terms, *viz.*, that these goods were to be of a certain character, and that before the goods should be accepted, they should be inspected by manual delivery of the same goods into the custody of the defendant. No legal delivery therefore could be complete until an opportunity had been afforded for that inspection, and unless, upon such inspection, the articles corresponded in quality with the goods as contracted to be sold. Whether this transaction be considered under the denomination of a sale, or of a delivery, the completion of the contract depends on the fulfilment of the conditions: if, after the delivery for inspection, the goods were found to be deficient in quality, there was no sale or delivery. As to the bargain and sale alleged, the case is still more clear. The bargain and sale is not an unqualified bargain and sale, but subject to particular conditions annexed thereto; if special conditions be named, the bargain and sale cannot be complete until these conditions have

been completed. The defence that the bargain and sale was of corn to be delivered at a specific time, or of a specific character; and that it was not so delivered, may be set up, therefore, under a denial of the bargain and sale. In the present case, if it can be shown that plaintiff, by his broker, sold corn to the defendant, and rested his case on that sale; the defendant, by showing that under that contract the corn should be of a particular character, and that it was not in fact so, might answer the action. It seems therefore, on principle, and independently of all authority, that this plea is unnecessary. Another question was argued, that this plea, although it was not necessary, substantially conformed with the 56th section, because it sets forth the particular facts on which defendant relies. Ever since the earliest period from which I have had occasion to consider this Act, I have been strongly of opinion that the policy of the Act, as conveyed by the language of the Act itself, would be advanced by allowing the parties to put forward succinctly and concisely the facts, but not the evidence, on which they mean to rely. The Act has abolished all special demurrers: argumentativeness was a ground for special demurrer before the Act, and I should be very slow, indeed, to hold that this should now be made a ground for upsetting pleadings. With respect to the pleading being embarrassing, I should not be disposed to set it aside on that ground, if it had not contained the allegation with which it closes; but, after stating that the contract was subject to certain conditions, and showing, further, that these conditions were not complied with, the plea goes on to state that there was no delivery and acceptance, and closes with that statement. I think this might have been a valid ground of objection to the plea, and such as might authorise us in not allowing it to stand, as it might seem calculated to create some embarrassment to the plaintiff, from the difficulty of determining whether he should treat it as a mere denial or as a plea in confession and avoidance. If this statement, however, had not been inserted in the close of the plea, I should find some difficulty in holding that the plea was a bad one; it admits the bargain and sale, but containing conditions, which it says you did not perform; and says, the delivery was made for a certain qualified purpose, and under certain

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conditions contained in the contract for sale, which were not completed; and I would suggest that such a plea would be unobjectionable: because, first, it shows to the party what are the particular facts on which the defendant relies; and secondly, indicates to the Court the issues which are material for raising the proper question: and, I may add, thirdly, enables the jury to know the particular matters of fact on which they are to determine; and on this pleading issues might be easily framed. Another thing occurred to me in the course of this argument, that the proper and more formal mode to plead, in reference to the bargain and sale, would be as follows:— True it is that this was a bargain and sale, but there was a certain condition annexed thereto which was not complied with; and again—true it is, there was a sale and delivery, but the sale was made on the terms of the special contract, which I have described and the delivery was made on that bargain and sale, and upon no other; and if so pleaded, it would have been a pleading in confession and avoidance. Although it is now unnecessary to decide the point, I wish to express my opinion on this subject, inasmuch as it is the subject of controversy in the other Courts; and I should be anxious, for the sake of uniformity in the construction of this Act in the different Courts, without which suitors cannot proceed, nor Counsel advise with safety, to endeavour, as far as I can, to conform to the opinion of the Queen's Bench, even if contrary to my own: the unreported case in that Court seems to apply very closely to the present. It is, however, unnecessary to make any distinct decision here, owing to the agreement which has been entered into.

PENNEFATHER, B.

It may, perhaps, be unnecessary to say anything, as an arrangement has been made which will free the case from all embarrassment. With regard to the construction I am inclined to put upon this pleading, I shall make a few remarks. The action is brought for goods sold and delivered, and goods bargained and sold. The defendant pleads first, that the goods were not sold and delivered; secondly, that the goods were not bargained and sold; and then

a special defence is put in, for the purpose of showing, not any facts arising in his case—not any facts which he intends to bring forward, but facts which must necessarily come forward on the trial of the plaintiff's claim; and this third defence is substantially this—I agreed to purchase certain goods, provided they be delivered to me in a sound and merchantable state. Before the Common Law Procedure Act, this defence might be given in evidence under the first two pleas; but it is said, that, on account of the 56th section of that Act, it is no longer competent for the defendant to make proof of any defence, without stating specially the circumstances of that defence. The construction I put on that section is, that it is not competent for the defendant to rely on any extrinsic facts, which he does not put forward in his plea. But here, when the plaintiff comes to prove his case, he must prove the actual contract, viz., that it was a sale of corn in a sound and merchantable state, and that it should be so delivered: that must be the case on which the plaintiff is to rely. When he is making out his case, it is competent to the defendant to show that he fails in so doing, by the proof of the corn not being merchantable. This is not a new fact, or extrinsic to the plaintiff's case; but merely that the corn was not within the description of that contracted for: and the plaintiff will fail in his case, by not showing that it was within that description; i. e., by the infirmity of his own case. This third plea is therefore unnecessary, as the matter of it might be given in evidence, notwithstanding the provisions of the late Act. It is, of course, most necessary to attend carefully to those provisions; but they cannot be considered to extend to cases where the whole subject-matter of the defence is in the plaintiff's mind, and is not brought forward as a new case by the defendant. It is desirable that the pleadings should be as short as possible; and it appears to me that this pleading is unnecessary, since it is not called for, for the purpose of apprising the plaintiff of the nature of the defence. It is desirable that all Courts should give the same construction to this Act, which requires great consideration in working it out. I do

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*Eschequer.*

MOSELY

P.

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T. T. 1856. *Exchequer.* not think that the objection to this plea, as being embarrassing ;  
 MOSELY good, as issues might be easily framed upon it.  
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I am disposed to concur with the rest of the Court, in their view, with respect to the necessity of filing this plea. This plea, in my opinion, is not necessary ; at the same time, with regard to the discussions which have taken place in other Courts, the defendant was quite right in using this plea for his safety ; and the rule for liberty to plead double, which I granted myself, was a correct one because the Judge is obliged to hear such motions *ex parte*. He is not supposed to judge of the necessity or propriety of putting in the plea, and the party pleads at his own risk of losing his record ; therefore, where there is a possible ground of defence by pleading double, it is a reason for giving leave to do so ; and I merely read what was in the affidavit used on the motion. It would have been an imprudent thing for the defendant not to have pleaded a special plea, under the existing state of the decisions on the subject.

FIGOT, C. B., and PENNEFATHER, B., concurred in thinking that the order for liberty to plead double had been correctly granted.\*

\* RICHARDS, B., *absente*.

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## PIERCE SOMERSET BUTLER

v.

Right Hon. H. E. BUTLER, Viscount Mountgarret.

Jan. 26.

THIS was an ejectment on the title, tried at the Kilkenny Spring Assizes, March 1855, before Mr. Serjeant Berwick and a special jury.

The question involved in the case was the legitimacy of the defendant, whom the plaintiff contended to be illegitimate, by reason of his father Henry Butler having been, at the time of his marriage with defendant's mother (a Miss Harrison), already married to one Mrs. Colebrook; and this alleged prior marriage was the point of dispute.

The following were the facts of the case:—The late Earl of

produced by plaintiff, to prove that before she heard of the regular marriage of H. B., she had heard from members of the family of his Scotch marriage; that evidence was objected to by defendant as hearsay evidence, and not falling within any of the exceptions to the rule excluding such evidence.—*Held* (PIGOT, C. B., *dissentiente*), that the evidence was properly rejected.

A letter of the 26th of September 1816, from S. B., a brother of H. B., to P. B., the father of H. B., in which S. B. mentioned a statement made to him by H. B., on the subject of the Scotch marriage, was offered in evidence, and rejected.—*Held*, that the letter was properly rejected, as not being within the class of declarations which, in matters of pedigree, are admissible; also as a declaration clearly made *post litem motam*.

A letter of Mrs. C., with the Moffatt post-mark thereon, to a third person, of the 26th of March 1811, was offered in evidence by the defendant, as evidence that she was then at Moffatt; and was objected to by the plaintiff, as evidence of that fact; but the defendant insisted that it was evidence generally, and the Judge ruled that it was admissible. It had appeared from the evidence of a Scotch advocate, at the time this letter was offered, that the fact of an irregular marriage depended on all the circumstances of the case, antecedent, accompanying and subsequent. After that letter had been received, the defendant gave evidence of the alleged Scotch marriage having occurred in April 1811. Another letter of Mrs. C. was also read in evidence, subject to objection, dated the 13th of May 1811; both letters were signed as Mrs. C.—*Held*, that the letter of May was admissible, as showing that after the alleged marriage, she still called herself Mrs. C.

*Held also* (PIGOT, C. B., *dissentiente*), that the letter of March 1811 was admissible for the same purpose, at the period of the trial at which it was offered, namely, before the defendant gave evidence of the alleged Scotch marriage having occurred in April.

*Held also* (PIGOT, C. B., *dissentiente*), that the exception which objected to the admission of both letters was too wide, as one of the letters was admissible.

H. B., in September 1811, contracted a regular marriage with Miss H., during the lifetime of a Mrs. C., with whom the plaintiff alleged that H. B. had previously contracted an irregular Scotch marriage. Lady O., a member of H. B.'s family, was

H. T. 1866. *Kilkenny* died in the year 1846, seized of the estates in question, and without issue. He, however, had three brothers, the eldest of whom was Somerset Butler, who died in 1826, without issue. The second, Henry Butler, was the father of the defendant, and died in 1842; and the third, Pierce Butler, was the father of the plaintiff, and died in 1846.

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To prove the plaintiff's case; the following evidence was adduced:—first, a letter written by Henry Butler (the defendant's father) to Pierce Butler, dated the 7th of April 1823, which was as follows:—

“Nunmonkton, 7th April 1823.

“DEAR PIERCE—In your letter to me, dated the 20th of February, you say you are going over to Kilkenny to send me the remnant of my last half-year's interest; but as I have not yet got it, I think it but right to inform you that your agent (whoever he is) has not sent it. I have fought off my bills in this country as long as possible; and if I do not get a supply from you I must go to ‘quod.’ In your letter you complain of want of intellect to comprehend mine. I own I am not a very clear and comprehensive writer; but even with the small share of said article which you allow yourself to possess, in which (take notice) I do not agree, as I think nature has been most bountiful in that particular to you. *The case relative to Mrs. Harrison* can be explained in a very few words, namely, that my brother, in a conversation he had with her shortly after my marriage, and at which time she was expressing her intention of making me a present of a farm, advised her not to do so, as I was a wild fellow, adding, sooner or later that there would be a similar case to that of the Berkeley, and laid down at the same time what he would do, were he in her place, relative to her will, and that they had not spoken for many years. She had such a deference for his opinion that she followed it. So much for brotherly advice. With respect to the insinuations you accuse me of, I deny them as such, for my letter to you was open and downright, as I said, being one of the sureties. I did not like the accounts standing unpassed for so many years;

“and also, when I mentioned my surprise that the estate was  
 “not as well, if not better, able to pay the interest of the different  
 “charges now as at the demise of my father, I meant not to do  
 “so by insinuation, but to assert what struck me as an extraor-  
 “dinary thing, knowing that agricultural produce was lower then  
 “than even now. Relative to the other circumstance in yours, I  
 “have only to say, when a Mrs. Crawford waited upon me to let  
 “me know that Mr. Taaffe was going to hurry a thing through the  
 “Courts of Edinburgh to foist off his wife upon me, I thought  
 “it full time for me to prove that she had been married to  
 “Mr. Taaffe long before I had been in Scotland; and as all  
 “or most of my witnesses were in France, without one shilling  
 “to bring them over, I was obliged to pay the piper; and, to  
 “enable me to do so, I was obliged to raise money. There is  
 “nothing very insinuating in this letter. I shall, therefore,  
 “conclude, with begging you to believe me most sincerely yours—

“H. BUTLER.”

Sarah Blake, *alias* Stride, was then examined as a witness for the plaintiff, and stated that she had been lady's maid to Mrs. Colebrooke; that after Mrs. Colebrooke's husband's death, in 1809, Henry Butler, the defendant's father, became acquainted with Mrs. Colebrooke at Brighton, and afterwards lived with her on terms of intimacy, sleeping with her at night in London; that Mrs. Colebrooke went from London late in the autumn of 1810, and went to Edinburgh, and Mr. Butler accompanied her as far as Newcastle-on-Tyne, when he left and returned to England, and she went on to Edinburgh, where she took a house in Northumberland-street; and two or three months after that, witness saw Henry Butler at an hotel in Edinburgh; that one Mr. Taaffe became acquainted with Mrs. Colebrooke after she went to Northumberland-street, in the early part of 1811; that witness had suspicions of an intimacy subsisting between Mrs. Colebrooke and Taaffe, the same as with Mr. Butler; that the intimacy continued up to the time of Henry Butler's coming there, which occurred one day in the latter end of March or beginning of April 1811, about five o'clock in the afternoon, when he came to Mrs. Colebrooke's house; that she heard he

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**H. T. 1856.** had arrived in Edinburgh, and gave orders not to admit him; that  
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he walked up and down the street, and was refused admittance; witness heard him say it was his house, and keep him out nobody should; he said Mrs. Colebrooke was his wife, and keep him out who dare; that he scaled the wall at the back of the house, and entered the house; witness met him at the top of the kitchen stairs, and asked him how he dare break in? and he said it was his house and his wife, and he had a right to come in. Mrs. Colebrooke met him at the top of the kitchen stairs in the hall; Mr. Taaffe was in the bed-room; that Mrs. Colebrooke had left the bed-room, and knew it was Mr. Butler who was in the house; witness locked Mr. Taaffe in, and Mr. Butler and Mrs. Colebrooke went into a little housekeeper's room at the top of the first flight of stairs, where they remained together for ten minutes or so; that witness unlocked the bed-room door, and Mr. Taaffe went into the drawing-room; Mr. Butler and Mrs. Colebrooke came out, and went up stairs to her bed-room; after they had been there some little time she rung the bell, which witness answered, when Mrs. Colebrooke told witness to call up the other servants; that Butler was then present; and that was all Mrs. Colebrooke said; witness called up the footman and nurse-maid, and went up with them; when the three went into the room, Mrs. Colebrooke said that Mr. Butler wished her to call them up to witness that he and she were man and wife; they were standing side by side, with their backs to the fire-place, joining hands; Mr. Butler merely nodded his head; Mrs. Colebrooke was cool and collected, and he appeared quite cool; and the servants then left the room, and Mr. Butler shortly after left the house, going direct from the bed-room; that Taaffe and he did not see one another on that occasion; witness did not see Mr. Butler in Northumberland-street after that night; that Mrs. Colebrooke left the place in a few days after, for Moffatt, about sixteen miles at this side of Elvinfoot, on her way to Elvinfoot; that she left in her own carriage, and was joined at Moffatt by Mr. Butler, who was there when she arrived; Mr. Butler and Mrs. Colebrooke then went to Elvinfoot, and remained there ten days, and lived together

as man and wife, sleeping together at a small inn, and whilst there they went to a little place called Crawford, for a ride; they went afterwards to Edinburgh, by Moffatt, where they only stopped an hour or two; that there was a quarrel between them; Butler came to Edinburgh with Mrs. Colebrooke, and rode on the coach-box all the time, whilst she sat inside, and on coming to the North bridge the carriage stopped, and he got down, and Mrs. Colebrooke proceeded to Northumberland-street; that witness did not see Henry Butler afterwards; that Mrs. Colebrooke afterwards went to London with Taafe, whom she afterwards married in the following autumn.

On cross-examination, Sarah Blake stated that she did not remember Mrs. Colebrooke to have been at Elvinfoot and Moffatt before the transaction occurred at Northumberland-street; but it was about ten days after it that she went there, and while there she did not call herself Mrs. Butler.

The depositions of Mr. Taafe, a Roman Catholic gentleman, were read for the plaintiff; and from them it appeared that he had met Mrs. Colebrooke in Edinburgh in the autumn of 1810, when she was living in Northumberland-street, and had cohabited with her, sleeping with her at night, but not living with her as man and wife, and inhabiting separate houses; that on the night of the scene described by Sarah Stride, he (Taafe) was in bed with Mrs. Colebrooke; that they heard a great tumult, and Mrs. Colebrooke got up and ran down in her night-dress, and after about half an hour she came back most distressed, crying, pale and in a great state of fear and terror; that that scene had occurred in the middle of the spring of 1811, but he (witness) did not recollect the time exactly; it might have been in February; that up to that time no promise or declaration of marriage had taken place between him and Mrs. Colebrooke; that several months later he left Edinburgh, and met Mrs. Colebrooke at Alnwick, and from thence went together to London, whence he went to Ireland, and met her next at Belfast, where she came of her own accord, and they went together to Edinburgh, where they remained until 1812, and some weeks after that the ceremony of marriage was performed between them by a Roman

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Margaret Cranston stated that she saw Mrs. Colebrooke and Henry Butler at Elvinfoot, about the end of April or beginning of May; that they were called Mr. and Mrs. Butler, and being cross-examined she stated that she did not hear them call themselves Butler, but they were called so by everybody else; and that she (witness) could not swear that it was not in the second week of March they were at Elvinfoot; that Mrs. Colebrooke was at Elvinfoot in company with Taafe in August 1811.

Thomas Ivory, a member of the Scotch Bar, was then examined, with reference to the law of marriage in Scotland, and deposed that by that law it is not necessary to have any religious ceremony. If a man and woman meet in the presence of witnesses, that constitutes marriage, if they say they take each other as man and wife, and intend it. Marriage requires the consent of the parties who enter into the contract, it is a mere civil contract; there is no particular mode of expressing consent, the gentleman may give sufficient consent by a nod. This is a marriage *per verba de presenti*. If there be anything equivocal in the performance of the ceremony, there must be proof of the intention, and every circumstance, before, during and after the ceremony, is to be taken into account as evidence of intention, and amongst them is subsequent cohabitation. Intention is a matter of fact, and every circumstance is for a jury to consider, and subsequent cohabitation is one of those circumstances. On cross-examination, witness deposed that the contract is indissoluble when made; that it lies on the party averring the marriage to show all the circumstances constituting consent; the meaning must be to constitute a present marriage. That cohabitation means living together as man and wife; mere sleeping together does not constitute cohabitation. It is to be determined by the surrounding facts whether living together for a few days after the alleged marriage, without publicly acknowledging each other, would constitute a marriage. It is an important circumstance if she never called herself by the name of her husband.

The Dowager Marchioness of Ormonde, a connexion of the Butler family, was then produced, and deposed that she had heard of the marriage of Henry Butler with Miss Harrison. She was then asked if she had previously heard, in the family, of a Scotch marriage between H. Butler and Mrs. Colebrooke; and the Counsel for the defendant objecting to this question, or to any evidence of reputation in the family as to a marriage in Scotland being allowed to be given on the issue in this case, and Counsel for the plaintiff insisting that the same was good and valid evidence, the learned Judge refused to allow it to be put, or to allow any evidence of the family reputation as to a marriage in Scotland to be given in this cause (and this ruling formed the ground of the first exception).

On the part of the plaintiff, there was offered in evidence a passage in a letter from the Hon. Somerset Butler to the Hon. Pierce Butler, dated the 26th of September 1816, which ran as follows:—"He (meaning Henry Butler) said that Mrs. Colebrooke, "in Scotland, had called up several of her servants, as witnesses, "and that they had taken each other as man and wife;" and Counsel for the defendant objecting to the reception of said passage as admissible in evidence on the issue in this cause, the Judge refused to allow the passage to be read in evidence, or read to the jury as evidence, and ruled that the same was not admissible evidence in this cause (and this ruling formed the ground of the second exception).

A second passage in the same letter was then offered by the plaintiff, which was as follows:—"He (Henry Butler) showed me "a letter he had written her (Mrs. Colebrooke), calling her his wife "and the mother of his children;" and Counsel for the defendant objected to the reception of this passage as admissible in evidence on the issue in this cause, and Counsel for the plaintiff insisting that the same was good and legal evidence to maintain the issue, on plaintiff's behalf, the learned Judge refused to allow the said passage to be received in evidence, or read to the jury as evidence, and ruled that the same was not admissible (and this ruling formed the ground of the third exception). The plaintiff's case then closed; and the defendant, having gone into his case, produced several

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Witness was asked that they did not see Mrs. Catherine Maynard with Henry Butler at Newell near Ermine about the end of March or beginning of April 1891. A letter from Mrs. Catherine to her son John of March 1891 with the Moffat post-mark thereon was then shown to the jury if the defendant so prove that Mrs. Catherine was then at Moffat; and Counsel for the plaintiff objected to the said letter as any evidence of the place in which the writer was, and insisted that the said letter was not evidence; but Counsel for the defendant insisted that the said letter was evidence, and the learned Judge ruled that the said letter was good and admissible evidence in behalf of the defendant on the issue in the case, and that the same might be read and given in evidence; to which ruling and admission the Counsel for the plaintiff excepted (and this formed the ground of the fourth exception).

Counsel for defendant then tendered in evidence two other letters from Mrs. Colebrooke, dated respectively the 13th of May 1811, and the 17th of July 1811; and Counsel for the plaintiff objecting, the learned Judge ruled that the same were admissible (which formed the grounds of the fifth and sixth exceptions respectively).

The defendant then produced a Mr. Bell, a member of the Scotch Bar, who deposed relatively to the Scotch law of marriage; that the circumstances surrounding, and the conduct of the parties at the

time and prior and subsequent to the declaration of marriage should be inquired into, and the letters and correspondence of the parties should be included in the consideration of their conduct.

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A bill of Law Burrowes, dated the 16th of April 1811, was then produced and read for the defendant, and was as follows :—

“ My Lords Justice General, &c., humbly means and complains  
“ your servitor Mrs. Belinda Edwards, otherwise Colebrooke, widow  
“ of, &c., upon the Hon. Henry Butler, brother to the Earl of  
“ Kilkenny. That he having conceived a deadly hatred, &c., against  
“ me, he by himself and others of his causing, sending, hounding  
“ out, command, resett, assistance, retihabition, daily and continually  
“ troubles and molests me in my family, lands, heritages, rooms,  
“ &c., and threatens to bereave me of my life, lying in wait for  
“ that effect, and daily and continually persists in his wicked and  
“ malicious intentions, in high contempt of us, our authority and  
“ laws, and in evil example to others to commit the like in time  
“ coming, unless remedy be provided thereto as is alleged. Therefor  
“ I beseech your Lordships for letters of Law Burrowes at my  
“ instance on the premises, according to justice. ‘Endorsed apud  
“ Edinburgum decimo, sexto die Aprilis millesimo octingentesimo  
“ et unidecimo. Fiat ut petitur.’ The person complained upon  
“ under the penalty of one thousand marks Scots. D. Boyle. Letters  
“ signeted, S. A.”

The learned Judge then charged the jury, and among other things having left to them the consideration of the said letters of Mrs. Colebrooke, the Counsel for the plaintiff again called upon the learned judge to withdraw the said evidence from the jury; and thereupon the jury gave their verdict for the defendant.

A bill of exceptions was accordingly prepared, stating the said objections in the above form, and duly signed by the learned Judge.

*T. Lawson* (with him *Lynch*), for the plaintiff.

The passages in the letter of Somerset Butler to Pierce Butler, dated 12th of September 1816, which are the subject of the second and third exceptions, are admissible as declarations of a deceased member of the family, and are not objectionable as being hearsay

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 GARRET. on hearsay, or as going into particulars. The same observation is applicable to the Marchioness of Ormonde's evidence: *Rez v. Inhabitants of Bramley* (a); *Roscoe on Evidence*, 8th ed., p. 3; 1 *Ph. Evid.*, pp. 200, 203, 204; *Goodright v. Moss* (b); *Sussex Peerage case* (c); *Stephanus Fortunatus, Achaius case*; 12 *Via Abr., Evidence*, T b, p. 91; *Berkely Peerage case* (d); *Doe d. Banning v. Griffin* (e); 1 *Taylor on Evidence*, p. 505: nor are they objectionable on the ground of having been made *post litem motam*, although the state of facts which afterwards gave rise to the controversy had arisen: *Reilly v. Fitzgerald* (f), overruling *Walker v. Countess of Beauchamp* (g); *Davies v. Lowndes* (h).

The letters of Mrs. Colebrooke, which are the subject of the fifth exception, are inadmissible, according to the rules of evidence in this country.

*P. Barlow, Napier and Butt*, for the defendant.

This is not a question of pedigree or of a genealogical nature, and family reputation is therefore not admissible: *Shields v. Boucher* (i); *Gressly on Evidence*, p. 320; *Monkton v. The Attorney General* (k). Evidence of reputation must be general, and not as this is, of particular facts: *Peake on Evidence*, pp. 12, 16, 17; *Mosely v. Davis* (l); *Campbell v. Twemlow* (m); *Lord Trimleston v. Kemmis* (n); *Sussex Peerage case* (o). Mrs. Colebrooke's letters must be presumed to have been written when and where they were dated: *Davies v. Lowndes* (p); *Rez v. Burdett* (q); and are evidence of her intention at the time, and want of consent to the alleged marriage, and that she did not bear the name of Butler: *Trimleston v. Kemmis* (r); *The Irish Society v. The Bishop of*

(a) 6 T. R. 330.

(c) 11 Cl. & Fin. 85.

(e) 15 East, 293.

(g) 6 Car. & P. 552.

(i) 1 De G. & Sm. 40, 50.

(l) 11 Price, 162.

(n) 9 Cl. & Fin. 749, 780.

(p) 7 Scott, N. R., 141, 214.

(b) Cowp. 594.

(d) 4 Camp. 401.

(f) 6 Ir. Eq. Rep. 335.

(h) 6 Man. & Gr. 520.

(k) 2 Russ. & M. 155.

(m) 1 Price, 81.

(o) 11 Cl. & Fin. 102.

(q) 4 B. & Ald. 95.

(r) *Ubi sup.*

*Derry* (a); *Nugent v. Bantry* (b); *Graham's case* (c); *Aveson v. H. T. 1856.*  
*Kinnaird* (d); *Piers v. Piers* (e); *Jolly v. McGregor* (f); *Morris v. Eschequer.*  
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*D. Lynch*, in reply.

A question of pedigree embraces the particular facts of both marriage and death, and the periods of them: 1 *Taylor on Evidence*, pp. 507, 510. A marriage may be proved by reputation. In cases of pedigree, the reputation must be based on particular facts: 1 *Taylor on Evidence*, p. 501. The time of the event may be thus proved: *Rez v. Eriswell* (h); *Shields v. Boucher* (l). The letter of the 16th of April shows that the marriage took place on the 13th, and that excludes the letter of the 26th of March.

Leave having been given to argue the last point raised in reply, viz., the date of the alleged marriage, being stated by the defendant to be in April, rendered Mrs. Colebrooke's letter of the 26th of March, which was previous to that date, inadmissible.

*Butt*, for the defendant.

Declarations to show the motives of parties need not be contemporaneous: *Rawson v. Haig* (m); *Ridley v. Gyde* (n). The letter is evidence that Mrs. Colebrooke was at Moffatt at the time when it bears date and was posted: *Roscoe on Evidence*, p. 23; *Rez v. Watson* (o); *Rez v. Burdett* (p); *Davies v. Lowndes* (q); *Malpas v. Clements* (r); *Goodtitle v. Milburn* (s); *Taylor on Evidence*, p. 111; *Archangelo v. Thompson* (t); *Rez v. Hensey* (v).

(a) 12 Cl. & Fin. 642, 665.

(c) 2 Lew. Cr. Cas. 108.

(e) 2 H. L. C. 363, 375.

(g) 5 Cl. & Fin. 240, 242.

(i) 4 Per. & D. 686.

(l) *Ubi sup.*

(m) 9 Bing. 349.

(p) 4 B. & Ald. 95.

(r) 19 L. J., Q. B., 435.

(t) 2 Camp. 620.

(b) 2 H. & Br. 156.

(d) 6 East, 188.

(f) 3 Wils. & Sh. 179, 194.

(h) 4 Per. & D. 220.

(k) 3 T. R. 719.

(n) 2 Bing. 99.

(o) 1 Camp. 215.

(q) 7 Scott, N. R., 141.

(s) 2 M. & W. 853, 860.

(v) 1 Bur. 646.



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GREENE, B.

The first exception was taken by the plaintiff to the rejection of certain evidence offered on her behalf to be given by the Dowager Marchioness of Ormonde.

It appears from the bill of exceptions that the plaintiff proposed to give in evidence, and offered to prove by the Marchioness, "that before she heard of the marriage of Henry Butler with Miss Harrison, she had heard from some member of the Butler family that he had contracted a marriage in Scotland with Mrs. Colebrooke;" and that Counsel for the defendant "then objected to the proposed evidence of reputation as not admissible evidence, and insisted that same ought not to be received;" and that Counsel for the plaintiff "thereupon insisted that same was admissible evidence, and ought to be received." Whereupon the Judge allowed the said objection, and ruled, "that the said evidence so proposed to be given was not admissible evidence for the plaintiff;" to which ruling defendant's Counsel excepted.

The first point to be considered is, what is the question raised by this objection? I apprehend it to be this, whether an answer given by the witness, in the words which it was proposed that the witness should be allowed to depose in, would be legal evidence in the present case? It has been argued that it must be implied from the terms of the objection, and therefore that the defendant must be taken to have admitted that the evidence tendered was evidence of reputation. I do not, however, consider that the objection involves any such admission. It means simply that the evidence offered *by way* of evidence of reputation was not admissible in point of law. The defendant has therefore on this exception a right to argue that the evidence objected to was not such evidence of family reputation as the law allows in a case such as the present. The general rule is that hearsay evidence is inadmissible. To this rule, however, some exceptions have been allowed, on the ground of necessity. One of these exceptions is in matters of pedigree, in which statements

made by third parties are admitted; provided, however, first, that the facts to which the statements relate are properly and strictly matters of pedigree, or, as they are sometimes described, genealogical; secondly, that the statements are those of members of the family; and thirdly, that the persons who made the statements are dead.

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Let us examine therefore whether these conditions can be said to exist with respect to the evidence which is the subject of the present exception. This is a very peculiar case. The title of the plaintiff depends upon his being able to invalidate a regular marriage between Mr. H. Butler and Miss Harrison, by proof that a prior valid marriage had been celebrated in Scotland between him and Mrs. Colebrooke. The evidence now under consideration was tendered for the purpose of proving such former marriage, such earlier marriage not being one through which either party in the suit claimed. No case has been cited in argument, nor have I been able to discover any, in which declarations of members of a family have been admitted as evidence of the fact, that, before a marriage publicly and regularly solemnised, and admitted so to have been, one of the parties had married another person, who was still living. Suppose no other evidence had been offered in the case except that now under discussion, as proposed to be given by Lady Ormonde, would it have sufficed? The plaintiff's case is this: "I am the descendant of Pierce Butler, the fourth son; I claim this estate, because, although Pierce had an elder brother Henry, who was married in September 1811, whose son, the issue of that marriage, is now in possession, and who, having been born after that marriage, is *prima facie* legitimate, and entitled before me, yet I will prove that there was actually a prior marriage of Henry, and consequently that his second marriage was void." In support of that case he adduces direct evidence of the alleged former marriage, by examining a person stated to have been actually present at it—by proving the law of the country in which it is stated to have occurred, and by evidence of various facts and circumstances, from which the fact is, as he alleges, to be inferred. I am not aware that, under such circum-

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stances, declarations of members of the family have been received for the purpose of showing that the first marriage existed, and therefore the second was void. Consider what the precise evidence offered was. The marriage with Miss Harrison had taken place; so it had appeared from the letter of H. Butler, of 7th of April 1823, which the plaintiff himself had read; for it is evident that in referring to "his marriage" in that letter, H. Butler referred to the marriage with Harrison; and Lady Ormonde herself had stated that she knew of the marriage with Miss Harrison; Lady Ormonde having thus herself given evidence of the marriage with Miss Harrison, as a member of the Butler family. The same witness is then asked (not on cross-examination, but on behalf of the plaintiff), whether she had heard amongst members of the family of a previous *contract* of marriage? Is this evidence, thus offered to invalidate the admitted marriage of September 1811, within the rule as to evidence in cases of pedigree; is it offered for purposes merely genealogical? or is it not rather to supply the want of the direct proof which the plaintiff was bound to give, in order to rebut the title of the defendant? Such an object may fairly be said not to be attainable by this evidence; as in *Whitlock v. Waters* (a), where the question being whether the last of three lives in a lease was dead, evidence of a witness, that he had heard so in the family, was held inadmissible; or in *Figg v. Weddiburn* (b), where, on a plea of infancy, letters of the deceased father of the defendant were not allowed to be read to prove the defendant's age; or in *Rex v. Erith* (c), where declarations of a deceased father, as to the place of a child's birth, were rejected as evidence of the proper settlement of the child. What I have hitherto said is on the assumption that the proposed evidence was evidence of family reputation, properly so called; but that is allowing to it a character which it does not, strictly speaking, possess. The evidence is not of a belief entertained in the family, not of any received tradition or general understanding in the family, but only of declarations by some members—not stating how many,

(a) 4 C. & P. 376.

(b) 6 Jur. 518.

(c) 8 East, 539.

or whom—not of what the family repute was, but of the fact of a contract of marriage in Scotland—not even of a marriage—it is not even that those members talked of a contract in Scotland before the marriage with Harrison, but that before she (Lady Ormonde) heard of the marriage with Miss Harrison, those members said so and so. I consider it therefore doubtful at the least whether, under the peculiar circumstances of this case, these alleged declarations, if otherwise unobjectionable, would be properly admissible in proof of the alleged marriage with Mrs. Colebrooke, as a matter of pedigree. I do not, however, wish to be understood as deciding that point, because I think that upon a different principle the evidence of Lady Ormonde in this case was properly rejected. I have already stated that one of the ingredients essential to the admission of declarations is, that they shall be the declarations of deceased persons. Now, was the evidence here offered the evidence of declarations by deceased members of the family? No, but of “members” of the family indefinitely, including living persons as well as dead. A deposition that Lady Ormonde had heard members of the family say so and so would not be evidence. Recollect that the admission of such evidence is an anomaly and an exception; it must therefore be shown to fall, and be brought properly, within the exception. This is not done here. Consistently with the evidence tendered, the members to whom Lady Ormonde referred might have been all living, and produced at the trial. The evidence of declarations of members of a family has been rejected, where it appeared that those members were alive, and might have been produced at the trial: *Pendrell v. Pendrell* (a). The rule is laid down as confined to statements of declarations of deceased persons. See 1 *Philips*, p. 197, 10th ed.; 1 *Taylor*, p. 507, sec. 577. The plaintiff might, when the objection to this indefinite evidence was made, have proposed to ask Lady Ormonde whether she had heard the marriage stated by particular individuals, naming them, and then, whether such individuals were dead? And if, to evidence modified in this way, a fresh objection had been taken, and an exception grounded upon the rejection of

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such limited and guarded evidence, a different question might have arisen. But the plaintiff must stand or fall by his exception; and unless we are prepared to affirm that evidence of declarations of members of a family were receivable, without its having been previously ascertained that those members were dead, I think we cannot hold, in the language of the exception, that the said evidence was admissible.

The second and third exceptions arise from the rejection by the learned Judge of a letter of the 12th of September 1816, written by the Hon. Somerset Butler to the Hon. Pierce Butler, father of the plaintiff. The plaintiff's Counsel proposed to read from this letter the following passage:—"He (Henry Butler) said that Mrs Colebrooke, in Scotland, had called up several of her servants as witnesses, and that they had taken each other as man and wife." The reading of this passage having been objected to by the defendant's Counsel, the learned Judge yielded to that objection; and this forms the subject of the second exception. The plaintiff's Counsel then tendered in evidence the following passage from the same letter:—"He showed me a letter he had written her, calling her his wife, and the mother of his children." The rejection of this last passage was the subject of the third exception.

Declarations of Henry Butler, legally proved, would of course have been evidence against the defendant. But as the proof of the making the declarations was in this case merely the unsworn statement of Somerset Butler, there was no pretence for saying that those declarations of Henry Butler could affect the defendant's admissions of facts. The only ground, therefore, upon which it could be alleged that these passages in the letters of Somerset Butler were evidence was, that they were declarations of a member of the family as to a matter of pedigree; and accordingly, upon that ground solely, was it argued before us, that they ought to have been received. On the part of the defendant it is contended, first, that these declarations do not properly fall within the class of hearsay evidence admissible in matters of pedigree; and secondly, that at all events they were properly rejected, as having been made *post litem motam*.

In the first place, I do not think that these declarations are of the character of those which in matters of pedigree have been admitted. In *Goodright v. Moss* (a), which was cited in support of the contrary proposition, the declarations of the parents were very properly received in proof of the time of the birth of their son, which was the only point in the case, the plaintiff claiming as heir, and the defendant using the declaration merely as evidence that the plaintiff was born before the marriage of his father and mother; there the lessor of the plaintiff claimed under the marriage, and the period of her birth was part of her title, as a matter of pedigree. So in the case in 12 *Vin. Abr.*, as to Stephanus Fortunatus and Achaicus; so in *Doe v. Randall* (b). In *Rex v. Eriswell* (c) Grose, J., says, "a pedigree may be proved by reputation:" and in p. 723, Lord Kenyon says that "declarations may be received as to pedigrees;" and such appears to have been the understanding in other cases as to the meaning of the rule. Now is this letter, or any part of it, a declaration by Henry Butler that Mrs. Colebrooke *was his wife* at the time of the declaration? Recollect we are not to view her expressions as admissions of facts, binding those claiming through him, and from which facts inferences may be drawn against such parties, but as statements by *a member of the family*, and evidence, as such, against all mankind, just as if made by Somerset Butler himself, or by Pierce Butler. Now suppose Somerset Butler or Pierce Butler had been proved to have said "My brother Henry "is in a scrape; Mrs. Colebrooke, in Scotland, called up several of "her servants, as witnesses, and they took each other as man and "wife before them, and she afterwards declined acknowledging him," could it be contended that this would be proof that Henry Butler and Mrs. Colebrooke were husband and wife? I apprehend not; and I cannot help thinking that it is owing to the confusion caused by the circumstance that the person who made the declaration was the *father* of the defendant, that this letter, or any passage of it, has been viewed as evidence; in other words, that has been treated as a declaration of a matter of pedigree, because made by the father,

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(a) Cowp. 591.

(b) 2 M. & P. 20.

(c) 3 T. R. 709.

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which, had it been made by any other member of the family, would at once have been seen not to be within the class of hearsay evidence on a matter of pedigree. But even supposing that this letter of the 12th of September 1816 could be considered as a declaration by a member of the family upon a point of pedigree at all, I am of opinion that it was properly excluded, because it was made *post litem motam*; as a declaration of Somerset Butler, made in 1816, it was very clearly *post litem motam*. I do not consider it necessary, for the purposes of this case, to examine whether the rule laid down by Alderson, B., in *Walker v. Countess of Beauchamp* (a), be or be not the correct one, viz., that the "*lis*" is to be considered as having arisen as soon as the facts out of which a suit has sprung have occurred. In *Reilly v. Fitzgerald* (b), Lord St. Leonards considers that this would be going too far back, and he assigns strong reasons for that opinion. Be this as it may, however, it is at all events well settled that, in order to exclude declarations of this nature, it is not necessary that a suit should have been actually commenced, or even in contemplation; it is enough that the fact has become a matter of controversy, or, to use the words of Sir E. Sugden, "that one person has alleged the fact to be so and so, and another alleged the contrary."

It is the province of the Judge exclusively to decide whether there was a "*lis mota*," in the foregoing acceptation of the terms, at the time when the declaration was made. He cannot have the aid of the jury upon that question; he may form his judgment upon it from the intrinsic evidence afforded by the declaration itself, from the other evidence antecedently given in the cause, and from other circumstances. It appears to me that, from these several sources of information, the Judge, in the present instance, would be well warranted in arriving at the conclusion that on and before the 26th of September 1816 there was a *lis mota*.

First, the letter itself, I conceive, furnishes convincing evidence to that effect. It does not purport to be a spontaneous communication from Somerset Butler, but seems like an answer to some inquiry made by Pierce Butler, or with reference to some investi-

(a) 6 C. & P. 650.

(b) Dr. Rep. 152.

gation then pending, relative to the nature of the connection between Henry Butler and Mrs. Colebrooke. It begins, "My dear Pierce—  
 "I think it just and fair to tell you all I know about Henry and  
 "Mrs. Colebrooke." What is the meaning of this? "I (Somerset  
 "Butler, think it my duty to come forward as a witness to testify  
 "what I know upon the question now in agitation, as to Mrs.  
 "Colebrooke being or not being Henry's wife." There is, how-  
 ever, much more to lead to the same inference. The letter pro-  
 ceeds:—"About April 1811, I met him (Henry) at the Bedford  
 Coffee-house, much agitated: he said he was in a scrape;" that  
 is (as I understand it), in an awkward, embarrassing situation.  
 Why? Because (as I think it must be collected from the context)  
 the occurrence which he was about to detail might be, or had been,  
 alleged to have made him the husband of Mrs. Colebrooke. Again:  
 "Mrs. Harrison, at Brighton, complaining of his and her daughter's  
 "conduct, told me Mrs. Colebrooke had written her a letter, saying,  
 "if she gave her £13,000, she would give up her claim to Henry."  
 It is impossible, I think, to say that this letter of 1816 does not  
 contain internal evidence that at the time when it was written  
 there was a claim, or controversy, or question agitated in the family,  
 amounting to a "*lis mota*."

Then, independently of the letter itself, what had appeared from  
 other evidence before given, tending to the same result? A letter of  
 Henry Butler, dated the 7th of April 1823, had been read, in which  
 occurs this passage:—"The case relative to Mrs. Harrison can be  
 "explained by a very few words, namely, that my brother (meaning  
 "Somerset Butler), in a conversation he had with her shortly  
 "after my marriage (meaning his marriage with Miss Harrison),  
 "and at which time she was expressing her intention of making  
 "me a present of a farm, advised her not to do so, as I was a wild  
 "fellow; adding, sooner or later that there would be a similar case  
 "to that of the Berkeley, and laid down at the same time what he  
 "would do, were he in her place, relative to her will." Here we  
 have Somerset Butler actually announcing an intention to raise  
 the same question as arose in the Berkeley case, and this shortly  
 after Henry's marriage. Here is direct proof that the question

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as to the validity of that marriage had actually then been started; that is to say, between four and five years before the writing of the letter of 1816. Further, the letter of 1823 contains this passage:—  
 “I have only to say, that when a Mr. Crawford waited upon me to  
 “let me know that Mr. Taaffe was going to hurry a thing through  
 “the Courts of Edinburgh, to foist off his wife upon me, I thought  
 “it full time for me to prove that she had been married to Mr.  
 “Taaffe long before I had been in Scotland.” Now it had appeared  
 that Taaffe was married at Preston in 1812, and the proceeding  
 here adverted to must have related to an antecedent period; so  
 that we have Henry himself stating that, before 1812, Mrs. Cole-  
 brooke was to be foisted upon him as his wife. Can it be contended  
 that, under all these circumstances, it did not abundantly appear  
 that, before 1816, there had been a *lis mota*?

It may, however, be urged that, even admitting that Somerset Butler's declaration, being a declaration made in 1816, may be objectionable as *post litem motam*, and therefore, that the letter of 1816 might be properly rejected as the declaration of Somerset Butler, the writer of the letter, yet as *his* declaration of Henry Butler's declaration it might be considered with reference to the period when Henry made the statement, which was not 1816, but previously, and when there might not have been a *lis mota*. This is a fair argument, and deserves an answer. It appears to me that even so considered, Henry's declaration not only must be taken as not proved to have been made *ante litem motam*, but that the reverse is to be inferred. Somerset Butler's letter says:—“About 1811, I met him at the Bedford Coffee-house,” &c. Now, the period of 1811 is not stated, nor even the year itself positively: it might have been after Henry's marriage with Miss Harrison, nay, in 1812; but at all events, the very declaration showed that it was then a doubtful question whether he had made her his wife. He did not say “she is my wife,” or “I am her husband,” or “we are man and wife;” but he states certain facts, and Somerset Butler then says to him, “she is your wife;” and then the letter says “he seemed to agree with me.” Observe, no subsequent words of Henry's are stated, but Somerset gives his own

impression that Henry agreed in the correctness of the conclusion which Somerset drew as to the legal effect or result of the facts which Henry had stated. It seems to me to be a total perversion of the law, admitting hearsay evidence of pedigree, to say, that this was a statement of Henry Butler, that Mrs. Colebrooke was his wife. Suppose Henry Butler had consulted a lawyer, and said, "I am in a scrape—certain facts took place in Scotland;" and the lawyer were to say, "I think she is your wife," and that lawyer were to prove this conversation, and add, "Mr. Butler appeared to agree with me"—could that be called a declaration by him, as a member of the family, amounting to evidence of a marriage, so as to be admissible by him not merely against Henry Butler himself, or those deriving through him, but as against all the world? Not a case in the books will be found to warrant such a proposition. What is the foundation of all evidence of this nature? It is correctly and luminously laid down by Lord Eldon, in the case of *Whellock v. Baker* (a), which authority has been uniformly acknowledged ever since. Lord Eldon says:—"It was not the opinion of Lord Mansfield, or any Judge, that tradition, generally, is evidence even of pedigree: the tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. The whole goes upon that; declarations in the family, descriptions in wills, &c., all are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth." Can this be stated of a narration of facts such as Somerset Butler alleges that Henry gave him, whilst he (Henry) was much agitated? I cannot understand how this is to be classed in the category of declarations by a deceased member of a family on a question of pedigree.

These reasons, which are applicable both to the second and third exceptions, seem to be sufficient to justify the exclusion of the re-

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spective passages to which these exceptions relate. But I think there is an additional reason to warrant the rejection of the passage referred to in the third exception. That passage is as follows:—  
 “He (Henry) showed me a letter he had written her, calling her his wife, and the mother of his children.” This is Somerset’s hearsay evidence, not of anything which Henry had said, but of what he had written. The objection to this is, not that it is hearsay of a hearsay (which in matters of pedigree may, I admit, be allowable), but that it is hearsay of a written declaration, without its having been shown that the original writing could not be produced. I have not found any case deciding that the written statement of a deceased member of a family, relating to a matter of pedigree, can be proved by the written or parol statement of even another member of the family, unless a foundation for such secondary evidence has been laid. I infer directly the contrary from the authorities. In *1 Taylor on Ev.*, p. 515, it is said that correspondence of relatives is evidence on proof of the handwriting. How can we tell what may have been the purport of the other parts of that letter of Henry Butler, if produced? In *Slaney v. Wade (a)*, secondary evidence was given of the contents of a mural inscription, because the original could not be produced; and before secondary evidence can be allowed, satisfactory proof must be given of the existence and genuineness of the original: see *The Tracy Peerage case (b)*. Suppose other parts of this letter had stated the reasons why Henry Butler considered her his wife, or explained in what way she claimed to be his wife?

The fourth exception was taken in consequence of the admission in evidence of a letter of Mrs. Colebrooke, dated the 26th of March 1811. It appears from the record that “Counsel for the defendant  
 “then and there offered to read in evidence Mrs. Colebrooke’s letter  
 “of the 26th of March 1811 (with the Moffatt post-mark thereon).  
 “as evidence that she was then at Moffatt; but Counsel for the  
 “plaintiff then and there objected to the said letter as any evidence  
 “of the place in which the writer was; and Counsel for the plaintiff  
 “then and there insisted that the said letter was not evidence; but

(a) 7 Sim. 595; S. C., 1 M. &amp; Cr. 338.

(b) 10 C. &amp; F. 154, 181.

"Counsel for the defendant insisted that the said letter was evidence, and that he was entitled to read the same to the jury: and the learned Judge then and there ruled that the said letter was good and admissible evidence on behalf of the defendant, on the issue in this cause, and accordingly ruled that the same might be given in evidence: to which ruling and admission Counsel for plaintiff excepted." Now all that the Judge here ruled was, that the letter was evidence; for what purpose or to what extent he did not say. The exception then raises the question, and only the question, whether the letter was admissible for any purpose? And in order to sustain the exception, it should be established that the letter was not receivable with a view to any matter pertinent to the issue. That this is the sole question to be considered upon such an exception, appears from *Lord Trimleston v. Kemmis* (a), and *Irish Society v. Bishop of Derry* (b).

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We are, therefore, to consider whether, at the stage of the case at which this letter was offered, and as the evidence then stood, the letter was proof of anything bearing on the issue to be tried? For if it was, it ought not to have been rejected, and the exception must be overruled.

When this letter was offered, it had appeared from the Scotch advocate's evidence, that the fact of an irregular marriage might depend upon all the circumstances of the case, antecedent, accompanying and subsequent. Subsequent cohabitation as man and wife would, according to his evidence, go far to establish such a marriage; and accordingly, the plaintiff himself proved, by several witnesses, a cohabitation at Elvinfoot, which, as he alleged, took place after the scene in Northumberland-street, which he relied on as a Scotch marriage. But of course such cohabitation could not have been of any value in the case, unless upon the supposition that it really was after the transaction alleged to be a marriage. It is always to be remembered that it is the Judge alone who is to decide upon the admissibility of the document, upon the whole of the facts, as appearing at the time when the admissibility of the evidence is objected to. He cannot send a collateral issue to

(a) 9 C. &amp; F. 776.

(b) 12 C. &amp; F. 665.

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the jury to find a particular fact, for the purpose of enabling him to decide whether he shall receive 'a particular piece of evidence. This principle is strongly illustrated by the case of *Bartlett v. Smith* (a). In an action on a bill of exchange, purporting to be a foreign bill of exchange, and which was stamped as such, the defendant objected to the sufficiency of the stamp, on the ground that the bill, though purporting to be a foreign one, was really drawn in London, and he proposed to give evidence to prove that fact. The Judge below, thinking the bill to be regular on the face of it, admitted it. The defendant's Counsel then addressed the jury, and called evidence to show that the bill was drawn in London. The Under-sheriff (the Judge) then left it to the jury to say whether the bill was drawn in London or not? and they found for the plaintiff, viz., that it was not; but a new trial was granted, on the ground that the Judge ought in the first instance to have received the evidence, and himself decided whether the bill was a foreign one, and so whether the stamp was sufficient.

Now, what is the argument in support of the exception? It is this—that the letter of the 26th of March 1811 was inadmissible, because it was written prior to the transaction relied on by the plaintiff as a Scotch marriage. It is admitted that a letter signed "B. Colebrooke," written after that transaction, would be receivable, as tending to show that that transaction had not been considered by Mrs. Colebrooke as a marriage. "But," say the Counsel, "that transaction occurred in April, and the letter bears date in March;" that is, at a time when, as is on all hands conceded, she was only Mrs. Colebrooke. But what right had plaintiff's Counsel to argue in that way at the moment when the letter was tendered? None. He had not then fixed any precise time as the date of the transaction in Northumberland-street; some of his evidence referred it to the month of April—other parts of it to the end of March; one of the witnesses stated that she could not swear that it was not in the second week of March; and according to Taaffe's depositions, it might have been so early as

(a) 11 M. & W. 483.

February. It is, therefore, a fallacy to assume that the letter of the 26th of March 1811 was not subsequent to the transaction in Northumberland-street, and therefore ought to be excluded. The whole case must go to the jury; the Judge, when called upon to decide on the admissibility of this letter, could not take upon himself to say when the scene in Northumberland-street occurred, nor consequently that the letter was written prior to it. The argument now urged, founded upon what appeared at a subsequent stage of the trial, namely, the letter of Law Burrowes, is totally unsustainable. The defendant himself (say plaintiff's Counsel) proved the letter of Law Burrowes, and thus showed that the occurrence in Northumberland-street was on the 15th of April; and thus himself showed that the letter was prior. But when did he give this proof? Had he given it at the time when the letter was offered in evidence? No; all that we are at liberty to consider is, whether the exception was well founded at the moment when it was taken. After the letter of Law Burrowes was proved, the plaintiff's Counsel might have renewed his objection, and then called upon the Judge to withdraw the letter from the consideration of the jury; but he did not do so. The exception is not modified, or put upon this new ground; but instead of that, the Judge is allowed, without any fresh objection, to charge the jury. The plaintiff's Counsel rests upon the exception as already taken; and after the close of the charge, the learned Judge is again called upon "to withdraw the consideration of the said letters from the jury." That exception was clearly too wide, for it went to all the letters. If the plaintiff, at the close of the evidence, meant to contend that, at all events, the proof of the letter of Law Burrowes had disabled the defendant from using the letter, *that* proposition should have been distinctly put forward; and if not acceded to, should have been made the subject of a new and precise exception.

Let us next consider whether this letter ought to have been excluded, because it proved nothing relevant to the issue. Now can it be said that it was irrelevant? It was proved by evidence, *aliunde*, that this letter was in Mrs. Colebrooke's handwriting, that is, that she wrote a letter dated 26th of March 1811, and signed

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(a) 2 M. &amp; W. 853.

(b) 4 M. &amp; W. 312.

(c) 6 Bing., N. C., 296.

(d) 2 Ex. 191.

(e) Russ. &amp; Ry., C. C., 266.

(f) 3 Star. Rep. 64.

(g) 2 Camp. 622.

(h) 7 M. &amp; W. 516.

time of giving notice of the dishonor of a bill of exchange, though liable to be rebutted. H. T. 1856.

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We have thus *prima facie* evidence that on the 26th of March 1811, Mrs. Colebrooke wrote a letter, which letter was, in a day or two after, put by somebody into the Moffatt post-office. Was it not then for the jury to say whether that person was Mrs. Colebrooke herself? What inference would be naturally drawn as to that? Plainly this, that she was herself then at Moffatt, or in the immediate neighbourhood; in other words, that the visit to Elvinfoot, the exact period of which the witnesses could not depose to, was about the 26th of March 1811. Only one visit of ten days was sworn to; it did not appear that she had ever been at Elvinfoot but once. The time of this single visit was material; evidence to show that Mrs. Colebrooke was at Moffatt, about the 26th of March 1811, was therefore relevant; and if so, the letter tending to show that fact was properly received. The defendant had a right to say to the plaintiff, "If you rely on the visit to Elvinfoot as evidence of a cohabitation after the marriage, then I show by this letter *either* that the visit to Elvinfoot was *before* the alleged marriage, if that be supposed to have taken place in April, in which case the cohabitation is no proof of the marriage, or was after the alleged marriage, if that should be supposed to have taken place early in March; in which latter case, her then calling herself Colebrooke would be evidence in disproof of the alleged marriage."

As to the letters of Mrs. Colebrooke, of May and July 1811, they were indisputably written after the transaction in Northumberland-street, and were therefore admissible as acts of Mrs. Colebrooke, calling herself by that name, and showing that she then did not assume the character of Henry Butler's wife. Mr. Ivory in his evidence expressly states that it would be a material circumstance that the alleged wife never called herself by the husband's name.

As to the general exception at the end of the charge, it is merely that the plaintiff's Counsel again called on the learned Judge to withdraw the said letters from the consideration of the jury. That cannot be relied upon as a new exception applicable to each letter; it is general, and, being unsustainable in part, is wholly bad.



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RICHARDS, B.

I so entirely concur in the views of my Brother GREENE, that I think it unnecessary to state in detail my reasons for arriving at the same conclusion; it is sufficient to say that I rest my judgment on the rules laid down by him.

PENNEFATHER, B.

I also concur in the judgment of my Brothers, and think it also unnecessary to add anything to the able and clear judgment pronounced by my Brother GREENE; but just one or two observations with regard to the first exception, in which we have the misfortune to differ from my LORD CHIEF BARON, occur to me. It strikes me that the evidence tendered was not evidence of general reputation of the family, but evidence of declarations of some members of the family, not stating whether those members were alive or not, nor stating exactly the time when the declarations were made. This is not evidence of general reputation, but it is evidence of declarations with regard to particular facts which had recently taken place. I should be very slow to consider that such evidence ought to be admitted in cases where witnesses were examined who were present at the transaction. But independently of that, it appears to me that the objection that those declarations were made *post littera motam* cannot be removed from this evidence of Lady Ormond. The declarations as to the alleged marriage were evidently made when some controversy had taken place with regard to the marriage, and we find that this view is established by the letters of Somerset Butler, which followed immediately after; and it appears to me very clearly that the declarations must have been elicited by some controversy which existed, if not before, at least immediately after the marriage of Henry Butler with Miss Harrison took place. I cannot conceive how it is possible that this declaration should have been made, except on the supposition that claims were put forward by Pierce Butler, immediately after the marriage of his brother with Miss Harrison, and that these claims had existed previously to the making of the declarations. Whether these declarations were made by Pierce (himself interested in the matter), or other members of

the family, or whether those members were alive or dead does not appear. It strikes my mind very clearly that there must have been a controversy with regard to the claims of Pierce, in the event of his establishing a prior marriage between Henry Butler and Mrs. Colebrooke. With regard to the second and third exceptions, there is no direct evidence whatever of declarations made by Henry Butler; there is no evidence that he made those declarations, beyond the letter in question, and therefore the period of *lis mota* must be taken to be the time, not when Henry is supposed to have made these declarations, but when Somerset wrote the letter. If Somerset were alive, to be examined, it would be a different question; he might or might not depose to the declarations made by Henry, but as it is, the letters are the only evidence of Henry's declarations; and therefore it is we find that the period of *lis mota* is not to be considered with reference to the time of the alleged declarations of Henry, of which there is no evidence, but with reference to the time when Somerset reports those declarations, and when there was clearly a *lis mota*; and therefore we think the objection of *lis mota* existed to the reception of the passages from those letters. With respect to the fourth exception, I do not think it necessary to add anything, and am of opinion that all those exceptions should be overruled.

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PIGOT, C. B.

The first exception applies to the rejection of the evidence offered by the plaintiff to be given through the Marchioness of Ormonde. I have not been able to alter the view which I took of this exception at the close of the argument; and I am under the disadvantage of differing (an event which does not often happen amongst us) from my learned brethren, in holding that this exception ought to be allowed. Holding that opinion, I think it necessary to deal with each of the arguments which have been urged against this first exception, as they must be all negatived if it can be properly allowed. To the admissibility of this evidence, it was in the first place objected, that the declarations in the family, or the reputation in it, to which Lady Ormonde was asked to depose, were

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after the alleged marriage of Henry Butk that this alleged marriage was the fact on which the controversy arose; that the happening of that fact at the time at which the controversy must be commenced; that there was, from that time, a reliance on the authority of Baron Alderson, in *Walker*, reported in 6 *Car. & Paine*, p. 560, and that the ground, inadmissible. In the case of *Walker*, the fact upon which it was held that the controversy was not an actual dispute, nor even any matter on which the claimant depended, but the death of the deceased the right to the property claimed arose. The authorities before were an authority by which we ought to be bound to seem only to apply, in the case now before us, to the facts made, or any representation existing, after the death of the child. Kilkenny in 1840. Not only, however, has the rule supposed to have been laid down in *Walker* been questioned, but the opposite doctrine has been affirmed by the highest authority. In *Reilly v. ...* the fact upon which the right to the property litigated and on which the controversy in the suit arose, was that the child was a child. The question which was to determine the fact whether the child was or was not born alive? If the child was born alive, a portion (of course being personal estate) was vested, and would belong to the personal representative of the child. If the child was still-born, the portion never vested, and was to be disposed of as if there had been no child.—[THE CHIEF BARON here stated the facts of the case.]—I was once Counsel for the party interested in establishing that the child was dead when born. We pressed upon Sir Edward Sugden the authority of the rule supposed to be laid down in *Walker* and *Beauchamp*; and considering the way in which it was dealt with by Sir Edward Sugden, I think the decision of Baron Alderson (if it professed to lay down a general rule of Law) was directly in point against the admission of the evidence which was received.

in *Reilly v. Fitzgerald*. When Sir Edward Sugden, at the close of the argument, had to deal with that decision, he expressed his surprise at any such rule having been laid down as that represented to have been there applied; he thought the question, however, of so much importance, that he let the case before him stand for further consideration. Upon a subsequent day he delivered his judgment. He showed (I think conclusively) that if what Baron Alderson is reported to have stated in 6 *Car. & P.*, p. 560, was intended as laying down a general rule, it was in direct opposition to the opinions of the Judges in answer to the second and third questions in the *Berkeley Peerage case* (a).—[The LORD CHIEF BARON here read those questions.]—There, an entry made by a father in a Bible, that a son was his eldest legitimate son born in lawful wedlock, although made for the express purpose of afterwards establishing the son's legitimacy if questioned in a future proceeding, was held admissible in evidence in proof of that legitimacy. Sir Edward Sugden, in referring to those opinions at the close of the argument in *Reilly v. Fitzgerald* (b), said:—"From the nature of the evidence tendered there, consisting of entries respecting the birth, it must necessarily have been of declarations made after the birth, and the Judges held it to be admissible; whereas evidence of declarations made after the birth could not be received. However, if I am required to decide this important point of evidence, I shall look into the authorities before I give my decision." On a subsequent day he reviewed the authorities, citing the opinions of several of the Judges in the *Berkeley Peerage case*. He suggested a view of the facts which were before Baron Alderson in *Walker v. Beauchamp*, according to which that learned Judge might be understood as not laying down the general rule ascribed to him; but Lord St. Leonards concludes by saying:—"If the case is to be considered as establishing a general rule, it is opposed to the resolutions of the Judges in the *Berkeley Peerage case*, and I cannot act upon it" (p. 348). Some time before *Reilly v. Fitzgerald* was decided in Ireland, the same question arose in the

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(a) 4 Camp. 401.

(b) 6 Ir. Eq. Rep. 342.

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Court of Exchequer Chamber in England, in *Davies v. Lowndes*. Baron Alderson there said that his ruling in *Walker v. Beauchamp* was upheld by Lord Cottenham (b). The opinion of Baron Alderson, though entitled to the greatest respect, was, nevertheless, an opinion delivered at Nisi Prius, with apparently very little discussion at the Bar. No authorities appear, from the report in 6 *Co. and Paine*, to have been cited. There is no report of the case as it was presented to Lord Cottenham; and how far it became necessary to press the question, how the case ultimately terminated, whether by compromise or otherwise, we are now unable to ascertain. Lord Denman, in his judgment in *Davies v. Lowndes*, stated that, from the view which the Court took of that case, it became necessary to determine upon the propriety of the rule applied in *Walker v. Beauchamp*, though he considered it a question of considerable importance. I have thought it necessary to deal thus fully with this topic because it was a good deal pressed at the Bar, and because it is quite clear that if the rule alleged to have been laid down in *Walker v. Beauchamp* be law, the evidence of Lady Ormonde, irrespectively of any other reasons, was, in conformity with that rule, rightly rejected, and the fourth exception must be overruled. Deferring to the authority of Lord St. Leonards, in *Reilly v. Fitzgerald* (and I may be allowed to add, entirely concurring in his reasons), I am very clearly of opinion, that the fact of the marriage in the present case was not in itself the commencement of a controversy or *in mota*, which ought to exclude evidence of subsequent declarations or reputation that would otherwise be admissible as evidence of pedigree, and that the rejection of Lady Ormonde's testimony cannot be sustained upon that ground.

It was in the present case further argued, that the evidence tendered involved a statement of the *place* of the marriage, and was therefore inadmissible, on the ground that the place of the marriage was not proveable by evidence of reputation, according to the authority of *Rex v. Erith* (c). There, in a settlement case (in which the only question was as to the place of a pauper's birth), the

(a) 7 Scott N. R. 141; S. C., 7 M. & G. 471.

(b) 7 Scott N. R. 198; S. C., 7 M. & Gr. 517.

(c) 8 East, 539.

Declarations of a deceased father, stating the place where his child was born, were held inadmissible to prove the place of birth. The case of *Rex v. Brith* has been the subject of consideration in several subsequent cases. It was elaborately discussed by Vice-Chancellor Knight Bruce, in *Shields v. Boucher* (a). The Vice-Chancellor, in a most able judgment (although he did not decide the point, as he determined the case before him on another ground), intimated pretty strongly his opinions that reputation evidence is admissible to show the residence of a deceased relative, with a view to identify that relative as the person with whom relationship was proved; and decisions to that effect appear to have been made in *Hood v. Beauchamp*, *Hubbart's Evidence of Succession*, p. 468, and in *Rishton v. Nesbitt* (b). These cases are all cited in 1 *Taylor on Evidence*, pp. 511, 512, where he endeavours to show that the decision in *Rex v. Brith* ought not to be treated as ruling that, for a genealogical purpose in proving pedigree, evidence of reputation may not be received to prove the places where relatives are born and where they married, resided, came from, went to, or died; and that Lord Ellenborough (as pointed out by Vice-Chancellor Knight Bruce in *Shields v. Boucher*) carefully rested his judgment on the fact that no genealogical question whatever of relationship was involved in the inquiry in *Rex v. Brith*. "The controversy was not," Lord Ellenborough said (8 *East*, p. 542), "as in a case of pedigree, from what parents the child has derived his birth; but in what place an undisputed birth, derived from known and acknowledged parents, has happened." In the case now before us, the proposed evidence was of what the witness heard from members of the family (before the witness heard of the marriage with Miss Harrison), as to a marriage contracted by Henry Butler with Mrs. Colebrooke in Scotland. The evidence was offered, not for the purpose of proving the place where the alleged marriage took place, as a substantive and independent fact, but for the purpose of proving the fact of a marriage with a different person from Miss Harrison, at a time when the marriage with Miss Harrison had not been heard of by the witness (who was a member of the family); and that such

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(a) 1 De G. &amp; S. 50.

(b) 2 M. &amp; R. 554.

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anterior marriage took place while Henry Butler was in Scotland: the marriage with Mis Harrison having taken place in England after Henry Butler had been in Scotland. Whenever the fact of the marriage of an ancestor, prior to another marriage of the same ancestor, is to be proved, it is essential, if evidence of reputation can be at all given of such previous marriage, to trace it to a period anterior to the time of the second marriage, which is impeached on the very ground that it was solemnised when the wife of the former marriage was living. There may, in many cases, be no mode of fixing the time, and of showing the priority, save by proving that it took place during the residence of the party in a country to which he went, and which he left, at periods known and ascertained. In the ordinary conversations of common life, such an event is, for the most part, spoken of as having occurred in some specified place, and at or about some specified time. To reject evidence of a deceased member of a family, stating the fact of a marriage or of a birth, because the statement of the fact was, in the same sentence, coupled with the statement of the place where it occurred, would in many instances shut out the evidence of the fact of the marriage or the birth altogether. In my judgment, the decisions in *Hood v. Beauchamp* and *Rushton v. Nesbitt* ought to be followed; and, fully adopting the reasoning of Vice-Chancellor Knight Bruce in *Shield v. Boucher*, I am of opinion that the rejection of Lady Ormonde's evidence cannot be sustained on this ground.

Another objection was made, on the ground that the plaintiff did not claim through the marriage in Scotland, and therefore could not, in support of it, rely on evidence of reputation against one claiming as issue of a marriage, solemnised in due form, and valid if the former marriage had not taken place. I am not aware that it has ever been held, in any former reported case, that reputation evidence, in matters of pedigree, is to be so restricted. In a great variety of instances, the controversy arises upon the claim of a collateral relative. In such a case, the claimant's title frequently depends upon the fact that he is the heir of a person who died without lawful issue; and it must often happen that he can establish that fact only by showing that the person whose heir he claims to be

had no issue by a lawful marriage, the wife of which was living when a subsequent marriage, of which there *are* issue, was solemnised. Suppose the case of a couple, living for twenty years together as man and wife, so reputed, so declaring to each other, so spoken of by all the members of their families; suppose further, that their marriage, from the death of witnesses, the loss of the parish register (or the invalidity of proof by registry, in consequence of the parties not belonging to the Established Church), cannot be proved by direct testimony; suppose the husband, separating from his first wife, contracted a second marriage with another woman, valid in every respect, save that his first wife was living at the time: if the argument with which I am now dealing be well founded, it must follow that, after the death of all the parties, in the case which I have suggested, the nephew or grand-nephew of the husband of those marriages, who has died without issue of the first, could not, against the issue of the second, give evidence of reputation in proof of the first marriage. He could not, for instance, prove (if this argument be right) that for a period of twenty years, and up to the solemnisation of the second marriage, there was a general reputation in the family, similar to that which was proved in *Leader v. Barry* (a), that at a time when the husband and the first wife were residing in a foreign capital, they were married at the chapel of the British Ambassador. I cannot hold that such evidence would be inadmissible. And if it could be given for the purpose of establishing the *status* of wedlock during a series of years prior to a second marriage, in a case in which no direct proof of the first marriage was given, or in which (as in *Leader v. Barry*) such proof was rejected because a registry of a marriage at an Ambassador's chapel was not, in point of law, proveable; *a fortiori*, as it seems to me, it would be admissible to fortify such direct proof, if given, although such proof were contested by the issue of the second marriage. In the present instance there *was* evidence of what, if there was consent, was a marriage according to the law of Scotland. Evidence of a reputation in the family that Henry Butler was a married man after something that occurred in Scotland, and before the marriage

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(a) 1 Esp. 353.



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with Miss Harrison, appears to me legitimate and admissible evidence of reputation, for the purpose of fortifying (*valet quatenus*) the allegation that what was necessary to make him a married man took place during that period of time during which he was in Scotland, and before his marriage with Miss Harrison, which was solemnised in England. The reputation in the family was evidence of the *status* arising from the marriage; and, if it was capable of being referred to the transaction of the alleged marriage with Mr Colebrooke, was evidence that the *status* arose from that transaction and consequently that what was necessary to make that transaction a valid marriage had taken place, including mutual consent, without which that *status* could not have arisen. How much or how little weight ought to have been attached to such evidence is a different question. The circumstance that the conflict arose, in the present case, between a collateral relative and the issue of a marriage solemnised in legal form, unquestionably valid if there had not been and unquestionably invalid if there had been, a prior marriage cannot, in my judgment, affect the admissibility of evidence of reputation in proof of a prior marriage. The rule of law is, that for the genealogical purpose of proving pedigree such evidence is admissible to prove a marriage. If it be referable to a marriage which is proved by other evidence to be illegal, it is worthless; if there be no other proof of the marriage, it is evidence admissible to prove it; if there be other evidence of the marriage, it is still admissible to fortify and corroborate that proof. The thing to be proved being, by a rule of law, proveable by that species of evidence for the genealogical purpose of tracing pedigree, it seems a necessary corollary from that rule, that whatever be the particular purpose of the proof, if it be a genealogical purpose, the proof may be given for that purpose. To establish that one party is the heir of another, in proving pedigree, is a purpose strictly genealogical; and whether that purpose is effected by proving that the claimant is the son of a valid though contested marriage, or by proving that he is the nephew of an uncle, whose first marriage was childless, claiming against that uncle's issue by a second marriage solemnised while the first wife was living; it is still a genealogical

purpose, to be effected by proof of the *status* of the previous wedlock, and that *status* is proveable by evidence of reputation. I can find no authority for a distinction, as to the admissibility of evidence of reputation, between the proving of a marriage encountered by a second marriage, and the proving of a contested marriage where no second marriage is alleged. The general rule of the admissibility of evidence of reputation to prove marriage is laid down in several cases in terms which show the desire of the Judges to confine the exceptions to the two cases of actions for adultery and prosecutions for bigamy: *Read v. Prosser* (a); *Leader v. Barry* (b); *Doe v. Fleming* (c). I believe it very rarely happens that a controverted marriage is the subject of a trial, whatever be the relative positions of the litigant parties, at which evidence of reputation is not given to support, or to impeach, the marriage. For these reasons, I do not think the evidence ought to have been rejected on this ground.

A further objection made to this evidence, as tendered, was, that it was not properly evidence of reputation. Upon this point, the decision of which appears to me to depend very much upon the true construction of the record, I have the disadvantage of differing from my learned Brethren.

The plaintiff contends, that the statement of the proposed evidence means, as it appears upon this record (in conformity with what, as he alleges, passed at the trial), a proposal to give, through Lady Ormonde, evidence of the existence of a general reputation of the marriage in the family. The defendant, on the other hand, insists that the statement on the record means a proposal to give evidence of declarations made by members of the family, comprising persons living, and capable of being produced, stating the fact intended to be proved; and to offer the evidence of each of those declarations as evidence of the fact declared. Upon the former construction of the record, I apprehend that, Lady Ormonde being a member of the family, the evidence would be clearly admissible. Upon the latter construction it would, according to the rule laid

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(a) 1 Esp. 214.

(b) 1 Esp. 353.

(c) 4 Bing. 266.

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 admissible. The declaration of a living person who could be  
 himself produced, though a member of the family, is not prove-  
 as, in itself, evidence of a genealogical fact. But that a member of  
 the family may prove the existence of a general reputation in the  
 family, of a genealogical fact, is laid down in several authorities  
 Bull. N. P., p. 295; Doe v. Griffin (a); 3 Stark. on Ev., p. 55.  
 1 Taylor on Ev., p. 506; 1 Phil. on Ev., p. 217; Hubbert on  
 Evidence of Succession, pp. 166, 658. The existence of such a repu-  
 tation in a family is itself a fact; and there seems no reason why  
 it should not be proved, like any other fact, by those who personally  
 know it. Indeed, the inadmissibility of such evidence seems ne-  
 cessarily to result from the very principle upon which hearsay  
 evidence of deceased persons is received in matters of pedigree.  
 That evidence, by an exception to the general rule excluding  
 hearsay, is received as proof of what persons said, who must be  
 presumed to have an interest, as members of the family, in learning  
 the truth of genealogical facts occurring in the family, and to have  
 had no interest in misrepresenting them. And evidence of the  
 declarations of such persons is received because, being dead, they  
 cannot be produced, and to exclude that evidence would, in many  
 cases, make the proof of the facts impossible. But the credit  
 attached to such declarations in a great degree results from the  
 presumption that all the members of a family have a common  
 interest in learning the truth of genealogical facts occurring in it,  
 and that they have no interest in misrepresenting such facts. The  
 general reputation in a family is nothing more than the general  
 expression of the belief of its members in what is so learned.  
 Entries in Bibles and Prayer-books, and written pedigrees, to which  
 the family have access, are evidence for a similar purpose, mainly  
 because they may be presumed to attest the acquiescence of the  
 family in what they record, and thus to show what was generally  
 believed in it. A genealogical fact may have occurred in a family  
 in the lifetime of all its living members, and none of its members  
 may have died since the fact occurred. Proof of the existence of*

(a) 15 East, 293.

the reputation of such a fact, in a family so circumstanced, would be impossible, unless the testimony of one of its living members, deposing to a reputation of the fact in the family, which reputation he could only learn by communication with other members of the family still living, were received; and it would be rendered impossible by rejecting the sworn evidence of the very person, attesting the existence of the reputation, whose unsworn statement would be received after his death, in a great degree on the ground of the credit attached to it as vouching the reputation of the family.

Was, then, the evidence offered to be given through Lady Ormonde, or was it not, evidence of reputation?

The evidence so offered was, "that before she heard of the marriage of Henry Butler with Miss Harrison, she had heard from some members of the Butler family, that he had contracted a marriage in Scotland with Miss Colebrooke." This evidence was excepted to,—not on the ground that it was not evidence of reputation in the family; not on the ground that it was proposed to prove the declarations of living persons; not on the ground that the terms in which it was proposed were ambiguous, and that they might refer to what Lady Ormonde heard from deceased persons, or might refer to what she heard from persons still living, and capable of being produced as witnesses. So far is the exception from questioning the admissibility of the evidence because it was not evidence of reputation, that in express terms the exception calls it evidence of reputation. The exception, as stated in this record, is in these terms:—"Counsel for the defendant then objected to the proposed *evidence of reputation* as not admissible, and insisted that the same ought not to have been received." The exception, as I construe the record, seems to me to say simply:—"You are now proposing to give evidence of reputation in the family (existing before Lady Ormonde heard of Henry Butler's marriage with Miss Harrison), that he had contracted a marriage in Scotland with Mrs. Colebrooke: I object to any evidence of such reputation." The words in the exception, "proposed evidence of reputation," appear to me to be words not unlikely to have been adopted for the very purpose of admitting (in order to prevent the

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delay of putting specific questions in form to the witness), that the evidence tendered was evidence of reputation in the family, and raising the question of law, whether, on other grounds (such as those which have been argued before us), evidence of reputation in the family, of the fact proposed to be proved by such evidence, was admissible? If that was what was really intended, I think the words that have been used are not unsuited to execute that intention; and if they were so used, it would be very unjust to decide on this exception as if the evidence tendered was not tendered as evidence of reputation in the family, and was not at the trial, treated and excepted to as such. I am under a strong impression that if we should give a different construction to the record from that which I am now giving to it, and if we should treat the tender of the evidence as if it involved an offer to prove particular declarations of living witnesses, and on that ground should hold the evidence tendered to be inadmissible, we should decide upon a matter of form which was not, and pass by the matter of substance which was, really in controversy at the trial. I am greatly disposed to think that, in so deciding, we should rule, not what the learned Judge ruled at the trial, but a point which was not raised before him, and which was not, at the trial, present to his mind, or to that of either of the parties; or which, if it was then thought of at all, was, by the terms of the exception itself, describing the evidence tendered as evidence of reputation, waived at the trial. I think the terms in which the evidence was tendered convey, in fair construction, an offer to prove the reputation of the family, by showing what Lady Ormonde heard in it as the reputation which prevailed in it. Such reputation is usually ascertained by a member of the family, by means of conversation with other members of it. Suppose Lady Ormonde, on her direct examination, had given evidence in terms; "that, before she heard of Henry Butler's marriage with Miss Harrison, a reputation existed in the family that he had married Mrs. Colebrooke." Suppose, on cross-examination, she had stated, "that she knew of that reputation only from having learned it from all the members of the family with whom she was acquainted, and from never

“having heard the contrary until after the marriage with Miss Harrison.” Could it be contended that such an answer, on cross-examination, would destroy the effect of her direct testimony, and make it imperative on the Judge to withdraw it from the jury, on the ground that what she so heard did not warrant her in stating that such was the reputation in the family? If so, the fact of an existing reputation could not, in many cases, be proved at all; for in no other way can its existence for the most part be ascertained, than by learning, in some mode of communication with living members of the family, that belief, the expression of which in the family constitutes reputation: and of this character was the evidence given in *Doe v. Griffin* (a). I think that, according to the fair import of the terms in which this evidence was tendered by the plaintiff’s Counsel, and according to the way in which they appear by this exception to have been understood by the Counsel for the defendant, it was an offer to prove the existence of a reputation in the family, through Lady Ormonde, and to show her means of knowing it, and to fix the time of that reputation as prior to her learning the marriage with Miss Harrison, by proving, that at that time she had communications on the subject with several members of the Butler family, to which she herself belonged. So understanding the record, I think it was a tender of evidence of reputation which was admissible, and ought to have been received.

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It was argued, as a further objection to the admissibility of this evidence, that the reputation proposed to be proved was (irrespective of the objection upon the authority of *Walker v. Beauchamp*) *post litem motam*. I cannot find, at the stage of the trial at which the evidence was tendered, any proof whatever of a controversy as to the marriage. Neither am I satisfied that, in any part of the trial, proof was given of a controversy existing at the time to which the tender of the evidence was pointed; namely, before Lady Ormonde heard of the marriage of Miss Harrison. That marriage appears to have been a known, avowed, and creditable union, very likely to have been learned by all the

(a) 15 East, 293.

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members of the family immediately after it took place. Lady Ormonde stated that she heard of it "about the time it occurred. At the time, therefore, to which the evidence was pointed, the period had not arrived for a controversy as to the comparative validity of the two marriages. The letter of Somerset Butler (which was not tendered at this stage of the proceedings) was rejected, and was not read at the trial: and even if it had been read, proof of a controversy, after the marriage with Miss Harris could not affect the admissibility of proof of reputation existing before it. This ground of objection, therefore, fails upon the evidence.

On the whole, I am of opinion that the first exception ought to be overruled, and consequently that there ought to be a *verdict de novo*.

This being my opinion, it is not very material for me to discuss the other exceptions. As to the second and third exceptions, my opinion is against them, on the ground that the letter of Somerset Butler, of the 26th of September 1816, shows, upon the face of it, that a controversy had then arisen respecting the marriage. I do not think that either of the passages proposed to be read was inadmissible on the other grounds urged in argument. They appear to me to be (irrespective of *lis mota*), admissible upon the ordinary ground on which letters and statements of deceased members of a family are receivable in matters of pedigree. It is well established that the statement of a deceased relative, of what another deceased relative said, is admissible as evidence of reputation; and Somerset's account of his brother Henry's statement of that which is described in that statement) amounted to a marriage (according to the evidence of the law of Scotland), was I think, admissible in that view. The statement of Somerset, of what Henry wrote to Mrs. Colebrooke, appears to me to be admissible, not as secondary evidence of a letter, but as primary evidence that Henry, in showing Somerset the letter in which he called Mrs. Colebrooke his wife and the mother of his children, made, in effect, a declaration to Somerset of that import.

The fourth and fifth exceptions are to the admission of Mrs.

Colebrooke's letters of the 24th of March and 13th of May 1811. H. T. 1856.

With respect to the letter of the 13th of May, to which the fifth exception is applied, I think it was admissible, having been written after the alleged marriage, and being subscribed by her with the name of Colebrooke, showing (*valeat quantum*) that she did not then assume the name of her alleged husband.

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With respect to the fourth exception, applied to the letter of the 26th of March, the very able argument of the defendant's Counsel (Mr. *Butt*), on the second discussion of this case, has afforded strong grounds for holding that the letter of the 26th of March was admissible at the stage of the trial at which it was received, when the exact date of the transaction in Northumberland-street, relied on by the plaintiff as a marriage, was not ascertained by the evidence. But the evidence for the defendant having ascertained, and the case made by him being, that the transaction in Northumberland-street, so relied on, occurred in the month of April, a fortnight after the date of the letter; I am of opinion that the letter of Mrs. Colebrooke, written previously to that transaction, on which alone the plaintiff relied as a marriage, ought to have been withdrawn from the jury. The proceeding of Law Burrowes, and the entry in the cost-book of the writer to the signet, showed clearly the time of that transaction. To withhold testimony, which would render evidence inadmissible, until that evidence had been tendered and received, then to produce the testimony so withheld, and then to rely on both, is a course of proceeding which, in my opinion, ought not to be sanctioned. In many cases it has been held, that where a letter has been given in evidence, its date and its post-mark have been received as proof of the time when it was written, and the place at which it was posted. I am not aware that this has ever been received where the letter was not admissible for some other purpose between the parties. The letter of Mrs. Colebrooke, prior to the transaction in Northumberland-street, was not evidence with a view to show what name she then bore; and for any other purpose it appears to me to have been *res inter alios*. The only question which appears to me to exist as to this part of the case is, whether the sixth exception is framed in terms which disentitle the plaintiff to rely on that



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exception, since by it he requires *both* the letters of Mrs. Colburn to be withdrawn from the jury? I do not think we should construe with too great strictness, the terms in which exceptions are made in the haste of business at Nisi Prius are framed. It is enough if they indicate, with sufficient clearness, to the Judge and the opposite party, the matter of which the excepting party complains. The fair meaning of the sixth exception appears to me to be, that the plaintiff objected to each or either of the letters being left to the jury, and required the Judge to withdraw each from their consideration,—not that both should be withdrawn in such a sense, that the exception was applied to both letters together, and not to either of them alone,—an interpretation of this exception which I think neither reasonable in itself, nor consistent with the separate and distinct exception to each of the letters when offered in evidence. I should be disposed to construe the sixth exception by the two preceding exceptions, in which each letter was the subject of a separate objection: and to hold, that it is open to the plaintiff on this record to rely on the Judge's not having withdrawn, as I think he ought to have done, the letter of the 21st of March from the jury.

It is unnecessary to discuss this matter more fully; because, on the first exception I am, as I have already said, of opinion that the Court ought to be a *venire de novo*. The other Members of the Court being of a different opinion, and holding that all the exceptions ought to be overruled, there must, of course, be judgment for the defendant.

E. T. 1856.  
*Eschequer.*

## DARCEY v. CAHILL.

*April 26.*

S. FERGUSON, for the plaintiff, moved to set aside the defence in this action, as embarrassing. The action was brought for maliciously and falsely, and without reasonable or probable cause, filing an affidavit under the Bankrupt Act, 12 & 13 Vic., c. 113, s. 24, which falsely and maliciously stated that plaintiff was indebted to defendant in £321. 13s., on a bill of exchange; and for falsely and maliciously serving on the plaintiff a notice under said Act, of the filing of said affidavit, and requiring immediate payment of said debt.

To an action for maliciously and falsely, and without reasonable or probable cause, filing an affidavit of debt, and falsely, maliciously and without reasonable or probable cause serving a notice thereof under the Bankrupt Act, a defence traversing the allegations of the cause of action, in the words of the summons and plaint, was held good.

To this the defence pleaded was, that the defendant did not, without any reasonable or probable cause for so doing, or maliciously or falsely, make and file the affidavit in the plaintiff's summons and plaint stated, or falsely or maliciously state in the said affidavit the matters in the said plaint stated; nor did the said defendant maliciously, or without reasonable or probable cause for so doing, cause the plaintiff to be served with the notice in said summons and plaint stated.—[GREENE, B. This seems to be a negative pregnant; could a Judge easily settle issues on it?]

*James Kernan, contra.*

This defence is quite according to precedent; probable cause and malice constitute one cause of action. In *Cannock v. Cantwell* (a), issues were settled on a plea precisely similar to this.—[PENNEFATHER, B. That is a precedent in point.—RICHARDS, B. Were it not for that case, I should not have been inclined to hold this defence to be a good one.]

*Per Curiam.*

Let the motion be refused; and if the defendant succeed, he shall get his costs of the motion: in no case is the plaintiff to get his costs.

(a) 6 Ir. Jur. 151.

M. T. 1856.

Exchequer.PHILLIPS *v.* HUGHES.Nov. 3.

The costs of an affidavit of debt and summons in bankruptcy, ordered by the Commissioner, pursuant to the 12 & 13 Vic., c. 107, s. 18, to abide the event of an action pending at Law, may be recovered under that section by the plaintiff, if successful, as costs in the cause, although he may not have obtained judgment.

PURCELL, for the plaintiffs, moved that the proper officer of the Court should include, in the amount for which the plaintiffs sought to issue execution in this cause, the sum of £6. 6s. 7d., being the amount, as taxed and certified, of certain costs directed by the Commissioner of the Court of Bankruptcy to be costs in the cause, pursuant to the statute in that behalf; and for the costs of the motion. In April a notice was served on the defendant, requiring payment of the plaintiffs' demand, pursuant to the Bankrupt Act, 12 & 13 Vic., c. 107; and this not having been complied with, an affidavit of the debt was filed, and a summons thereupon issued under the 11th section of that Act, calling upon the defendant to appear before the Commissioner of the Bankrupt Court on the 8th of May. The defendant failed to appear on that day, and an order was accordingly made by the Commissioner, pursuant to the 18th section of the said Act, that the costs of the affidavit and summons should abide the event of an action which was then pending in the Court of Exchequer on foot of the same demand. This action had been commenced on the 5th of May, and in it the defendant, after his default in appearing, and the making of the above mentioned order, lodged the amount claimed in Court, which the plaintiff drew out, and proceeded no further in the action; and the costs of the action up to the date of the lodgment were taxed, and a certificate of the taxation obtained. The costs in Bankruptcy were also taxed and included in the Taxing-officer's certificate. But when the plaintiff sought to issue execution for the amount, the officer of this Court refused to include the costs in Bankruptcy in the execution, because the 18th section of the Bankrupt Act directs that, in case of the costs being ordered to abide the event of the action, "such costs shall be costs in the cause, and recovered in the judgment and execution in such action;" and there being no judgment in the action here,

considered that the words of the section precluded the recovery of these costs.—[PIGOT, C. B. I take the meaning of the Act to be that the costs shall be costs in the cause, and in case there be a judgment, then to be recovered under the judgment and execution.]

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*Eschequer.*  
PHILLIPS  
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HUGHES.

*Norman, contra.*

The party should go on and have judgment before he can obtain these costs. When he proceeds both at Law and in Bankruptcy, and the other party lodges the money in Court, and the action is stayed, then he is not to get the Bankruptcy costs.—

PENNEFATHER, B. You want to restrict the *event* spoken of by the Act to the case of a judgment, whereas the event contemplated by the Act is the success of the action.]

PIGOT, C. B.

I do not feel any difficulty in this case. The costs in Bankruptcy may be provided for in three ways: by allowing them to the trader summoned, or by directing them to abide the event of the action then pending, or of the action which shall thereafter be brought; and in the two latter cases it is provided that they shall be costs in the cause, and recovered under the judgment and execution in the action. Here it is contended that, as the action has gone off by the lodgment of money in Court, and there has been no judgment, the plaintiff is not entitled to recover these costs. But in case we were to decide in accordance with that view, the consequence would be that the defendant might in any case put in a plea, and cause the plaintiff to incur considerable expense; and then, by lodging money afterwards in Court, deprive him of his remedy for those expenses. We must give the statute a reasonable construction; and therefore, although it requires a particular mode of recovery, yet we must hold that this only applies to cases where such mode of recovery is possible. The Act besides directs that the costs shall be costs in the cause. We must therefore hold that all the costs in the cause are to be recovered, including the costs in Bankruptcy and the costs of this motion.

PENNEFATHER, RICHARDS and GREENE, BB., concurred.

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Eschequer.

## O'BRIEN v. TAYLOR.

Nov. 4.

A party cannot renew a motion which has been once disposed of; and therefore where a defendant applied to set aside a summons and plaint for irregularity, and the motion was refused because the original had not been filed:—*Held*, that he could not renew the motion after the filing of the original writ.

*Semble*—The omission of the indorsement, required by the 7th General Order of January 1854, is a fatal irregularity.

THIS was an application on behalf of the defendant, that the original writ of summons and plaint might be set aside for irregularity, as the same did not contain the indorsement required by the 7th General Rule of 11th January 1854; and that further proceedings should be stayed; and for the costs of the motion.

In the month of June previously, an application had been made before Baron GREENE, in Chamber, upon a notice in the following terms:—that the summons and plaint in this cause, a copy of which was served on the defendant, might be set aside for irregularity, as same did not contain the indorsement required by the 7th General Order; or in case the said summons and plaint, as sealed and issued did contain such indorsement, then that the service of said summons and plaint on the defendant might be set aside, and all proceedings stayed, as the copy writ, as served, did not correspond with the original. This application had been refused with costs, as the original writ had not been filed before the motion. The original writ, having been afterwards filed, was found to contain a printed form of indorsement, but which had been struck out and obliterated; and the defendant thereupon, in July, renewed his application to set aside the original writ, before Baron RICHARDS, in Chamber, who ordered the motion to stand over for the consideration of the Full Court.

*Exham*, in support of the application.

The reason of this motion being ordered to stand was, that the attorney for the defendant, in his affidavit in support of the motion, stated that he believed the indorsement had been struck out after the sealing and issuing of the original writ, in order to make same correspond with the copy served; and the plaintiff's attorney, in his affidavit in reply, having merely stated that no alteration was made

since the issuing of the writ, and that the obliteration occurred through mistake, was not considered by Baron RICHARDS to have been sufficiently satisfactory in accounting for the omission.

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O'BRIEN  
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TAYLOR.

This omission is a fatal one : *Price v. Powell* (a) ; *Fitzgerald v. Brown* (b).

*J. F. Nolan*, contra.

The plaintiff's attorney has since filed a further affidavit, accounting for the omission, and showing it to be a mere mistake.

This is an attempt to renew a motion which was discharged with costs in June last, and he cannot do so. The cases of *Joyne v. Collinson* (c), *Levy v. Coyle* (d), followed by *Leggo v. Young* (e), show that a party cannot move again upon amended affidavits.

*Exham*, in reply.

The first application was not similar to this, as it was framed in the alternative.—[GREENE, B. You ought, on that application, to have confined it to setting aside the service of the copy.—PIGOT, C. B. You moved two branches, and both were refused, and now you re-agitate one of them. If you make an application on insufficient grounds, you cannot, when your grounds are complete, renew it.]—The former was in effect no adjudication, for the Court never could deal with the original until it was filed.—[PIGOT, C. B. It is not the filing of the writ, but the writ itself, you want to set aside.—PENNEFATHER, B. The party should not have made either of these applications until he was prepared to substantiate his motion, and if he failed in doing that, he ought not now to be allowed to move anything having the same object ; the object in each case is the same, viz., to set aside the original writ.]—The motion was ordered to stand over by Baron RICHARDS, for final affidavits by plaintiff's attorney.—[PIGOT, C. B. The Court had a right to direct a further affidavit, to satisfy itself of the fact of the thing having been done by mistake, and not by misconduct.]

(a) 3 Ir. Com. Law Rep. 232.

(b) 3 Ir. Com. Law Rep. 253.

(c) 13 M. & W. 558.

(d) 7 Eng. Jur. 724.

(e) 25 L. J., C.P., 176.

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We think this motion, not only in substance but in form, is one which should be refused. I do not say whether, even supposed to be in the form of the application to be unobjectionable, it should not be refused on substantial grounds. It is not now necessary to decide that. The first motion was framed in two alternatives, both of which were refused by Baron GREENE; one of these alternatives was that which, if properly before the Court at that time, might have been complied with. The irregularity complained of was an omission, occurring it is true by mistake, but still an omission, which, if properly brought forward, the Court would have acted rightly, on the state of the authorities, in setting aside the writ. But at the time that motion was made, there was no evidence of the state of facts, and the motion was accordingly rightly refused; but now the evidence which was then wanting is furnished, and we are asked to act upon it. This is similar to the cases cited, where, although there was sufficient evidence of facts to warrant the Court in granting the application, yet they refused to do so, on the grounds of its being a renewal of a former motion, upon amended evidence. We cannot allow the defendant to re-agitate the question and must therefore refuse the motion with costs.

GREENE, B.

The reason of this rule is to make the party inform himself of the facts, and to prevent his making applications until he has the facts ready; and if he does make a premature application, and then he will not be allowed to re-agitate the motion when his facts are complete.

PENNEFATHER, B., concurred.\*

\* RICHARDS, B., *absente*.

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Exchequer.

## CONNORS v. KENNEDY.

Nov. 6.

H. SMYTHE (with him *Lawson*) applied, on the part of the defendant, to set aside the summons and plaint and proceedings in this cause, as having been issued and taken without the authority of the plaintiff.

When an attorney's authority is denied, he may establish it by parol evidence; and it is not necessary that it should be in writing, except where upon the evidence the authority is doubtful.

The summons and plaint was for goods sold and delivered, and was served on the 24th of July last. The plaintiff has made an affidavit, denying authority given by him; and affidavits have been filed by the defendant, and by Mr. Ruttle, the plaintiff's attorney, against whom this motion is made.—[Counsel then proceeded to open the various affidavits made in the matter.]

On the whole of these facts there appears a total absence of written authority; and it is decided in Equity that, if the authority of the plaintiff to his solicitor be denied, the latter must show a written authority: *Beddy v. Smith* (a); *Executors French v. French* (b); *Buckle v. Roach* (c). In *Owen v. Ord* (d), Lord Tenterden said that every respectable attorney ought to have a written direction.—[PIGOT, C. B. Is there any direct decision at Law upon the subject?—Not that I am aware of. The old law was so strict on the point, that it even required a warrant of attorney to be procured, which should, moreover, be entered on the roll of the Court.

*Joshua Clarke* (with *Mackey*), contra.

There is no rule that the party must produce a written authority, if he shows other equally clear evidence. 1 *Ferguson's Practice*, p. 33, states that a written authority is not considered indispensable to a retainer. In *French v. French*, PENNEFATHER, B., says:—"I do not go the length of saying that, in every case an

(a) 8 Ir. Eq. Rep. 687.

(b) 4 Law Rec., N. S., 123.

(c) 1 Chit. R. 193.

(d) 3 Car. & P. 349.



M. T. 1856. "authority in writing is necessary, because the acquiescence of  
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 KENNEDY. *Lawson*, in reply.

There is a conflict of evidence appearing in the mass of affidavits in this case. In *French v. French* (a), there was documentary evidence, as a letter was sent to the party, and no answer was returned, and the draft bill was shown to the plaintiff's son, who had knowledge of the proceedings; but to hold that parol evidence of authority is sufficient, would be contrary to the decisions which exist on the subject: *Pinner v. Knights* (b).

PIGOT, C. B.

We have considered this case, during the course of the argument with a great deal of attention; and it does appear to me, on the whole of the affidavits, that the corroborative evidence of the retainer is perfectly overpowering. It has been contended that a rule exists in Equity, that the retainer cannot be established without the aid of documentary evidence; but the authorities cited do not bear out that proposition. I find, in the case of *Lord v. Kellett*, that an inference was sought to be drawn, from Lord Eldon's language in the case there referred to, in support of the rule contended for, which Sir Edward Sugden resisted. The Lord Chancellor said, it was true that a solicitor must, for the purpose of instituting a suit, receive specific authority from his client; but it had never been decided that such authority might not be given by parol; that the rule then contended for, viz., that, whenever the fact of the retainer is denied, the solicitor is bound to produce an authority in writing, was not a fair inference from the language of Lord Eldon; much less was it established by the cases referred to: and on a subsequent day, the Lord Chancellor stated that he adhered to the opinion that the authority for filing a bill might be by parol, as well as in writing, and that in the form

(a) *Ubi sup.*

(b) 6 Beav. 174.

(c) 2 Myl. & K. 1.

case it might be proved by the circumstances, and by the subsequent conduct of the party. That is in exact conformity with the cases cited, which go to this, that such an authority may be proved by parol evidence; but with this wholesome restriction, that where the authority on the evidence was doubtful, then the attorney should take the precaution of having his authority in writing. It very rarely happens in practice that authority in writing is given; the usual proof is that the parties were seen in conference, and that proceedings were taken, to which the party assented, and for which he gave directions. *Archbold's Practice*, p. 69, states that a verbal authority is sufficient; and that, in fact, in practice any other is scarcely ever given by the client. The rule contended for therefore clearly does not exist, and we have determined on the conflict of evidence which appears in this case.—[The CHIEF BARON here proceeded to comment on the evidence.]—It thus appears to us that the preponderance of the evidence adduced is so overpowering in favour of the retainer, that we cannot feel ourselves obliged to call for or require written evidence of the retainer. If a written authority were shown to exist, then it is clear, upon the cases on the subject, that we should have been obliged to call for it; but there is none such here.

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Now, with respect to the costs of the motion, this is a very serious motion, and, if carried, it would prove Mr. Ruttle to have been guilty of a breach of the sacred trusts of his office as an attorney, and would expose him to full costs, and the obloquy and censure of the Court. It is a grievous charge, but one from which he is fully absolved, as it appears to us on the evidence which has been adduced before us; and therefore we think that he should be given his costs of this motion, which must be refused.

PENNEFATHER, B.

I should be very glad that there were such a rule as that the evidence of the authority should be, in all cases, in writing; such is not the rule, however; and wise Judges have thought differently, and have expressed their opinion that such a rule ought not to be made. We must therefore act in conformity with the authorities

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**KENNEDY.** on the subject, and receive the evidence which has been offered, and upon that evidence I am of opinion that the retainer has been established. As Mr. Ruttle has been exposed to much obloquy, and the risk of having to pay the costs, if unsuccessful, he must now be entitled to receive his costs of this motion.

GREENE, B., concurred.\*

\* RICHARDS, B., *absent.*

#### COVENEY v. GIBSON.

Nov. 6.

The plaintiff is entitled to require an affidavit of merits when applied to for security for costs; and if the defendant, when so required, fail to furnish the affidavit, and applies to the Court, he will have to pay the costs of the motion.

CHARLES BARRY moved for security for costs, upon the usual affidavit of merits, the plaintiff being resident out of the jurisdiction.

*Charles W. Orpen*, for the defendant.

The plaintiff served the usual notice requiring security, to which the defendant's attorney replied, by a notice, stating that he was willing to give the security, upon the defendant's making an affidavit of merits in the usual form, and the costs of such affidavit to be paid by the defendant. The plaintiff then served us with an affidavit of merits, and at the same time with notice of the present application, which we submit was unnecessary, in consequence of the undertaking.

PIGOT, C. B.

It is a very important thing for professional gentlemen to understand the discretion upon which the Court acts in applications of this nature. The notice required by the 52nd Rule is for the purpose of preventing applications under circumstances similar to

those which exist in the present case. That Rule directs the party requiring security to serve a notice, calling upon his adversary to give such security; and if his adversary refuses to comply with that notice, he is then entitled to apply to the Court to stay the proceedings, until the security be given; but the Court will not give an order to that effect, unless it is satisfied that the application is not made for the purpose of delay; and in order to show that it is not made for this purpose, the terms of making an affidavit of merits are imposed upon the party applying. The result of this is, that it is the duty of the party seeking security for costs to furnish such an affidavit to the opposite party, in case he should require it: that was done in this case; but how was it done? By serving a notice of this application to the Court, simultaneously with the copy of the affidavit. I am of opinion that, in all instances in which so reasonable a requisition is made, the party refusing to comply with it should be made to pay the costs of the motion. However, in this case—but only in this case—let the plaintiff, undertaking to give security for costs, have his costs if he succeed in the action; and in no event let the defendant have his costs.

M. T. 1856.

Eschequer.

COVENEY

v.

GIBSON.

PENNEFATHER and GREENE, BB., concurred.\*

\* RICHARDS, B., *absente*.

## MORTON v. MAHON.

Nov. 20.

W. WOODROFFE, on behalf of the plaintiff, a judgment creditor, moved, under the 63rd section of the Common Law Procedure Amendment Act 1856, to attach a judgment debt owing by a third

The Court will grant a conditional order to attach a debt due to the personal representative of a deceased judgment debtor, in the hands of a garnishee, under the 63rd section of the Common Law Procedure Amendment Act 1856.

M. T. 1856. person to the first judgment debtor's executrix. This motion has  
*Eschequer.* been ordered to stand over for the Full Court.  
 MORTON  
 v.  
 MAHON.

The affidavit of the plaintiff stated the obtaining, in Trinity Term 1850, of judgment *de bonis propriis*, by the plaintiff against one Bridget Mahon, executrix of Edward Mahon, deceased, £454. 14s. 4d., besides £65. 16s. 7d. costs; that said judgment was unsatisfied, and that the whole sums, with interest, were due; that Bridget Mahon had died in 1853, having, by her will, appointed her sister Anne De Courcy and her niece executrices and that Anne De Courcy had obtained probate, saving the rights of the niece, and had possessed herself of considerable assets of the testatrix, including a judgment obtained by her in Hilary Term 1844, upon bond and warrant, against James and Susan De Courcy, upon which there was then due the sum of £264.

In November 1856, the plaintiff obtained an absolute order entitling him to file a suggestion for execution upon his judgment under the 149th section of the Common Law Procedure Act 1853 and the order now sought is a species of execution.—[PENN FATHER, B. Are the garnishees so far the debtor of the executrix that under the old forms an action in the *debet* would lie against them?—The words “judgment creditor” and “debtor” do not necessarily mean the parties to the original record; they mean those who stand in their shoes. The executor of the judgment creditor may attach the debt if he revives the judgment: *Bayne v. Simmons* (a). If the debt be a legal one, it may be attached: *McDowall v. Hollister* (b).—[GREENE, B. By getting this order you may disturb the administration of assets.]—A diligent creditor has a right to obtain priority by taking this step; the Legislature have thought fit to diminish the rights of the judgment creditor in the appointing of a receiver (19 & 20 Vic., c. 77, s. 3), and they have enlarged his remedies against the personal property of the debtor, by this proceeding. The judgment here is a judgment

(a) 24 Law Jour., Q. B., 253; S. C., 1 Eng. Jur., N. S., 657.

(b) 3 Eng. Com. Law Rep., Ex., 933.

n *nil dicit*, and the course which the plaintiff should have taken in obtaining such a judgment under the old law is stated in 2 *Tidd's* *Pr.*, p. 1118, to be as follows:—"Judgment against an executor may be upon *nil dicit*, for the debt or damages, and costs, to be levied of the goods of the testator in the hands of the defendant, if he hath so much; and if not, then the costs to be levied of his own proper goods." And then it is stated that, "in proceeding on this judgment, against the executor, it is usual for plaintiff to sue out a *feri facias de bonis testatoris, et si non, de bonis propriis*," according to the judgment.

M. T. 1856.  
*Exchequer.*  
MORTON  
v.  
MAHON.

The Court\* granted a conditional order for an attachment, as required; to be served upon the debtor's executrix and the garnishees.

\* RICHARDS, B., *absente*.

#### M'KINNEY v. REYNOLDS.

H. T. 1857.  
*Jan. 27.*

THIS was an application that an order for payment of the costs of a notice of trial, and for staying the plaintiff's proceedings in the meantime, might be set aside, as having been irregularly entered, the same not having been entered within the time limited by the 105th section of the Common Law Procedure Act.

The facts of the case were as follow:—Notice of trial, at the Lifford Assizes, on the 22nd of July 1856, was served on the 10th; and afterwards, on the 21st of July, a notice of countermand of the notice of trial was served. On the 3rd of August, the defendant's attorney prepared an affidavit, and filled up a requisition to

Vacation is to be included in the computation of the time within which a rule for costs, in case of not proceeding to trial, is to be entered; and when that time has elapsed, the Court has no authority to allow the rule to be entered.

H. T. 1857. enter the above order, which, however, the officer of the Court declined to receive, as he conceived the order could not be entered until after the expiration of the Vacation, which had then commenced; and in consequence of this, no proceeding was taken until the 28th of October, when the order was entered.

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REYNOLDS.

*D. Lynch (with him O'Neill), in support of the application.*

Section 105 enacts, that a rule for costs of the day for proceeding to trial, pursuant to notice, or for not countermanding in sufficient time, may be drawn up at any time within one month after the day of trial fixed by the notice of trial; and if such rule be not entered within said period, such costs shall be costs in the cause; and there is nothing in the Act to exclude the Vacation. Section 232 defines the holidays, and the purposes for which they are to be reckoned as such. Section 192 enacts, that every rule may be made, entered or issued on any day, whether in Term or Vacation. This order is given by express enactment, and not by a mere rule; therefore, when there is no exception for that purpose in the Act, the period of Vacation is not to be excluded.

*D. McCausland, contra.*

As this delay was occasioned by the misprision of the officer, the Court may, at all events, allow us to enter the rule *nonne pro tunc*.—[PENNEFATHER, B. The 105th section is quite peremptory that the rule must be entered within a month. The 192nd section says it may be entered in Vacation; surely then there is a default here that we cannot cure, whether it be produced by the misprision of the officer, or the default of the party.—GREENE, B. Then these follow words in the 105th section of the Act, to make the costs after the month has elapsed, costs in the cause.—FIGOT, C. B. The Act prohibits the Court from acceding to what you require.]—This application is late, as it falls within the 179th Rule, being to set aside the order as irregular, and should have been made within a reasonable time, which would be the following Term.—[RICHARDS, B.

The officer had no jurisdiction to enter the order at all after the month had expired.] H. T. 1857.

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PIGOT, C. B.

The words of the 105th section are express, and which the Court has no power to displace. If this rule should stand, the costs could not be costs in the cause. But for this provision, I should say we would have authority to hold this to be only an irregularity.

Order set aside, without costs.

### GORDON v. HASSARD.

Jan. 22.

An action was brought for the sum of £8, due upon an I O U of the defendant, and for the further sum of £4. 10s. 0d., goods sold and delivered, making £12s. 10s. 0d.

The defendant put in a defence of infancy, to which the plaintiff replied that the I O U was passed for necessities supplied to defendant, and also that the goods sold were necessities. The following issues were framed upon these pleadings by a Judge in chamber:—First, whether the defendant was an infant at the time of the contract? Secondly, whether the I O U was passed for necessities, as alleged in the replication?

On the trial, which was had before the LORD CHIEF BARON, in the Sittings after Michaelmas Term 1856, Counsel for the plaintiff asked the learned Judge to amend the plaint, by altering the sum claimed for goods sold and delivered, from £3. 5s. 0d., as stated in the plaint, to £12. 10s. 0d., and to amend the bill of particu-

An action upon an I O U and goods sold. Defence, infancy. Replication, that the I O U was passed for necessities, and also that the goods sold were necessities. Issues—First, whether the I O U was passed for necessities?—Secondly, whether the goods sold were necessities? At the trial, the Judge permitted the plaintiff to amend the plaint, by increasing the amount claim-

ed for goods sold, so as to include the amount of the I O U, and to amend the particulars by specifying the necessities for which the I O U was passed. On a motion for a conditional order to set aside the verdict because of the amendment—*Held*, that the amendment was proper, under the Common Law Procedure Act, as it raised the substantial question in controversy; and conditional order refused.



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 HASSARD.

lars, by specifying the articles for which the I O U was given, to add another issue, viz., whether the goods so sold and delivered were necessaries?

The defendant's Counsel objected to these amendments, but the learned Judge allowed them to be made, reserving liberty to the defendant to move to set aside the verdict, and then proceeded to charge the jury upon the amended pleadings, when a verdict was had for the plaintiff—£10 and costs.

*Coates* (with *J. A. Wall*) now moved, pursuant to the leave granted, served, for a conditional order to set aside the verdict.

*Williamson v. Watts* (a) was an action on a bill of exchange, and the plea and replication were the same as in the present case. Mansfield, C. J., said the replication was nonsense, and ought to have been demurred to, and he nonsuited the plaintiff. In the note to that case it is stated that the law is now settled, that an account stated by an infant, even of moneys due for necessaries, is invalid. If this amendment were to be allowed, it would in fact permit issues to be introduced which were never declared for, and which do not appear on the record, and it would make a different case from that which we came to meet.

PIGOT, C. B.

We are of opinion that we ought not to grant the conditional order sought for in this case. The only question is with respect to the amendment in introducing the sum of £12. 10s. 0d., instead of the sum of £3. 5s. 0d. stated to be due for goods sold and delivered. The circumstance which influenced me in allowing the amendment was, that I entertained no doubt that what the parties came to was, the liability of the party, being an infant, for the goods sold to him, including those that formed the consideration for the I O U, as stated in the replication; and that being so, it appeared to me that it was my duty to mould the record so as to meet the substantial question in the case. What was the form of the record when settling the issues? The plaintiff stated two causes of action, namely, an I O U and goods sold and delivered. The defence relied on as to both causes

(a) 1 Camp. 552.

of action was one of infancy ; and the replication was, that the consideration for which the I O U was passed was for necessities, and that the goods sold and delivered were also necessities. The parties then came before a Judge, who settled the issue whether the I O U was passed for necessities, as alleged in the replication ?

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If it were intended by the defendant to rely on the point that the document or I O U was of the nature of an account stated, and therefore void on account of his infancy, it seems that he deceived and deluded the Judge and the opposite party. I do not mean to say whether that was so or not ; but if it were not so, and he did not mean to rely on that defence, how stands the case ? At the time he settled these issues, he agreed with the opposite party and the Judge, that the substantial question was whether the goods sold were necessities ? Taking into account what must have passed before the Judge, it would be, to my mind, conclusive, that the parties came to try that question ; but that could not be tried unless this amendment was made ; because infancy is an answer to an action on an account stated. The conduct of the parties shows that they understood the question to be, whether or not the goods were necessities ? I therefore think we ought to have regard a good deal to what passes before the trial, and, if necessary, to accommodate the record to the existing state of things, and not allow parties to keep what is vulgarly called a stone in their sleeve until after the trial, and then to apply for judgment *non obstante veredicto*.

PENNEFATHER, B.

The only question is, whether the Judge was authorised to make this amendment ? and in my opinion, the words of the Act seem to embrace this case, and to allow the introduction of what " would be " necessary for determining the matter in controversy between the " parties."

RICHARDS, B.

It is sometimes very difficult to ascertain what is the real question between the parties, and therefore difficult to say whether an amendment should be allowed or not. No such difficulty, however,

H. T. 1857. exists here; because what the parties themselves went to try  
*Eschequer.* whether the goods sold were necessities or not? and according  
 GORDON an issue was framed for that purpose. There was a difficulty  
 v. point of law in raising that question, according to the manner  
 MASSARD. which the pleadings were framed, and the LORD CHIEF BARON  
 properly removed that difficulty by this amendment.

GREENE, B.

The Common Law Procedure Act was intended to extend the power of amendment; it enables the Judge at the trial to make all such amendments as may be necessary for determining the question in controversy between the parties. The case of *Widdowson v. Reed* (a) is very much in point with the present, and it accords with what my Brother PENNEFATHER has said; and it is there laid down that, whether or not the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties is matter of fact to be decided by the Judge.

(a) 15 C. B. 192.

CORAH v. YOUNG.

Jan. 24.

**Demurrer.**— ACTION for work and labour done by the plaintiff for the defendant. In an action for work and labour, the plaintiff did not aver that the work was done at the request of the defendant. Defendant demurred on that ground. *Held*, that the objection was fatal, notwithstanding that the Common Law Procedure Act abolishes the formalities of pleading.

ant.—Demurrer to the summons and plaint, for not containing the averment “at the defendant’s request.”

*Joshua Clarke* (with *Sullivan*), in support of the demurrer.

This omission is fatal, as one person cannot make another debtor by performing gratuitous services for him: *Osborne*

*Rogers* (a); *Fisher v. Pyne* (b); *Durnford v. Messiter* (c). It is thus H. T. 1857.  
 also in an action for money paid; but in actions for money lent, *Eschequer.*  
 or for goods sold and delivered, there need be no request averred, CORAM  
 as there a consideration is implied *per se*. The form in the schedule v.  
 of the Common Law Procedure Act contains the averment of re- YOUNG.  
 quest, and these forms have been prepared in conformity with the  
 existing state of the law.

In *Wilkinson v. Sharland* (d), which was a motion to arrest the judgment, for the omission of the words, "money payable," in a claim for freight, Parke, B., says:—"We cannot help calling 'the attention of the Profession to the carelessness with which 'the forms are followed. The Act of Parliament has prescribed 'particular forms almost for each case than can occur. There 'is as much administration to the laziness or indifference of those 'who desire to have little to do, as one can expect in an Act 'of Parliament; and when the work is almost done to the hands 'of those who are to construct the pleadings, it is very much to 'be lamented that they are passed by without any attention what- 'ever, and forms are resorted to which are certainly not given 'by the Act."

*C. H. Woodroffe*, contra.

The words of the statute are not obligatory, and a cause of action good in substance is sufficient, "without framing the statement in any particular form." Lefroy, C. J., in *Gason v. O'Ryan* (e), says:—"The whole tenor of the Act evinces a preference for substance over form, and discountenances mere technicalities."

PIGOT, C. B.

I should wish to adopt the language of Parke, B., in *Wilkinson v. Sharland*. It is really too bad that professional gentlemen will not look at the forms given by the Act; and if they will not do so, they must run the risk of involving their clients in the expenses

(a) 1 Wm. Saund. 264, n. 1.

(b) 1 Man. & Gr. 265.

(c) 5 Man. & S. 446.

(d) 24 Law Jour., Ex., 116.

(e) 7 Ir. Jur. 272.

H. T. 1857.  
*Eschequer.*  
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which may follow a deviation from these forms. The form laid down by the Act contains the averment of the defendant's request, and these words have been omitted in this pleading, by mere carelessness. It is quite plain from the state of the authorities, and the express form in the Act, that this omission is a substantial objection; and indeed it would be mere mercy to the plaintiff to allow this demurrer, as if he should hereafter come to a Court of Error, upon any question that may arise in the case, he might find himself seriously prejudiced by the pleading, if allowed to remain in this state. The Common Law Procedure Act recognises the existing state of the law on this point; and in prescribing the forms of actions for goods sold and delivered, and for money lent, has omitted the averment of request.

In the case of goods being sold and delivered, the contract becomes fulfilled and complete upon the delivery.

A loan is where a party lends money to another, on the undertaking to restore it; and in both these cases the act, from its nature, cannot be gratuitous; but where a person performs services for another, without the request or subsequent acceptance of the benefit arising therefrom by that person, there is no implied contract to pay him for those services.

In the present instance there is nothing averred from which a contract could be implied. An issue could not be well framed upon this pleading, for it should be in the words of the defence; and then in merely proving the fact of the work done, the plaintiff would be entitled to recover; and supposing that the work done was gratuitous, or intended as a present, he could not prove the fact upon that issue. So also, if the work were done on the promise of a third person, the defendant would not be liable; but yet on this pleading he could not go into that defence.

PENNEFATHER, B.

Before the late statute, it was determined in a variety of cases and on sound principles, that this averment of request was necessary. The statute then, though it abolishes the mere formalities of pleading, yet has retained these words in the form prescribed in

the schedule ; therefore I do not consider them as mere form which may be departed from ; and we cannot consider that the old law on this subject has been altered.

Demurrer allowed, with costs.

H. T. 1857.

*Exchequer.*

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HONOHAN v. AHERN.

E. T. 1857.

April 15.

SULLIVAN, for the plaintiff, applied, *ex parte*, under the 99th section of the Common Law Procedure Amendment Act (Ireland) 1856, 19 & 20 Vic., c. 102, for a direction to the Master of this Court to ascertain the amount for which final judgment should be marked. The plaintiff had obtained judgment by default, and the venue in the action was laid in the county of Cork.—[FIGOT, C. B. Notice should have been served here, as this proceeding is analogous to holding a writ of inquiry, in which the party must have notice.] —The practice in the Master's office is to serve a notice on the opposite party before proceeding to ascertain the amount.

An application for a reference to the Master to ascertain amount of final judgment, under Common Law Procedure Act 1856, must be made on notice, or a conditional order only will be granted.

FIGOT, C. B.

The Court has no security that that will be done, and notice should have been served here in the first instance. We shall grant only a conditional order.

NOTE.—See to the same effect *Duff v. Miller* (2 Ir. Jur., N. S., 209.)

H. T. 1857.

*Exch. Cham.*

## Cyrcbequer Chamber.\*

April 27, 28.

H. T. 1857.

Jan. 7.

Feb. 20, 21.

## BEAMISH v. BEAMISH.

(Error from the Court of Queen's Bench.)

Where a marriage contract was entered into between two members of the Established Church of E. and I., *per verba de presenti*, in the presence and with the intervention of a clergyman in holy orders, of that communion, and was followed by consummation:—*Held* (in accordance with *The Queen v. Millis*, 11 Cl. & F. 572), that such was a valid marriage, and that the issue thereof were legitimate.

Where, prior to the late Marriage Act (7 and 8 Vic., c. 81), a clergyman of the United Church of England and Ireland, being in holy orders, performed a ceremony of marriage between himself and one I. F., she being a Protestant, by reading in a room in a private house the form of solemnisation of matrimony as set forth in the Book of Common Prayer; no witness, or any other person, being present at the performance of such ceremony, but such performance having been seen, but not heard, by a third party, from an adjoining yard, without the knowledge of the parties themselves, and such ceremony being followed by consummation: *Held*, *per* LEFROY, C. J., PICOT, C. B., CRAMPTON, PERRIN, MOORE, JJ., and RICHARDS, B., a sufficient presence and intervention of a clergyman in holy orders, so as to validate the marriage, and legitimatise the issue of such marriage.—(*Dissentientibus*, MONAHAN, C. J., JACKSON, BALL and KEOGH, JJ., and GREENE, B.)

**EJECTMENT ON TITLE.**—At the trial before H. Martley, Q. C., at the Summer Assizes 1855, for the county of Cork, the jury found a special verdict on the following issues submitted to them:—First, whether the Rev. Samuel Swayne Beamish, being a clergyman in holy orders, of the United Church of England and Ireland, did, on the 27th of November 1831, perform a ceremony of marriage between him and Isabella Frazer, by reading between them the form of solemnisation of matrimony, according to the rites and ceremonies of the United Church of England and Ireland, by declaring that he then took her to be his wedded wife, by receiving her declaration that she then took him to be her wedded husband, by placing a ring on her finger, according to the said form of solemnisation of matrimony? Secondly, whether the said marriage was consummated? and thirdly, whether the plaintiff is the eldest son of the said Rev. Samuel S. Beamish?

On the issues so submitted to them, the jury found in the affirmative, and they found the following special verdict:—"That Dr. John Samuel Beamish was, in his lifetime and at the time of his decease, seised in fee of the lands and premises in the summons and plaint mentioned, and that he died, so seised and intestate, on the 16th of December 1852. That he had issue

\* Absente PENNEFATHER, B.

“several sons, of whom the Rev. Samuel Swayne Beamish was  
 “the eldest, and the defendant Benjamin Swayne Beamish was the  
 “second son. That in and previous to the year 1831, the Rev.  
 “Samuel Swayne Beamish was a clergyman, in holy orders, of the  
 “United Church of England and Ireland, episcopally ordained; and  
 “that on the 27th of November 1831, the said Rev. Samuel Swayne  
 “Beamish, being such clergyman in holy orders as aforesaid, went  
 “to the house of one Anne Lewis, in the city of Cork, and there  
 “performed a ceremony of marriage between himself and one  
 “Isabella Frazer, by reading between them, in a room in the said  
 “house, the form of solemnisation of matrimony used in the said  
 “United Church, as set forth in the Book of Common Prayer and  
 “administration of the Sacraments, and other rites and ceremonies  
 “of the said United Church, by declaring that he (the said Samuel  
 “Swayne Beamish) took her (the said Isabella Frazer) to his wed-  
 “ded wife; and by receiving a declaration of the said Isabella  
 “Frazer, which she then and there made, that she took him (Samuel  
 “Swayne Beamish) to her wedded husband; and by Samuel Swayne  
 “Beamish placing a ring on the finger of Isabella Frazer, and by  
 “pronouncing the blessing in the form appointed. That the said  
 “marriage was consummated between them the said Samuel S.  
 “Beamish and Isabella Frazer; but that no other clergyman in  
 “holy orders was present, or any other person, but one Catherine  
 “Coffey, who, unnoticed by the parties, saw the ceremony per-  
 “formed, from a yard adjoining the said house, but did not hear  
 “what passed between the parties. That at the time when the said  
 “marriage was performed, the said Isabella Frazer was a member  
 “of the said United Church of England and Ireland.”

H. T. 1857.

*Exch. Cham.*

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The special verdict further found that Samuel Swayne Beamish  
 died intestate on the 8th of April 1844, and that Henry Albert  
 Beamish (the plaintiff) is the eldest son of Samuel Swayne Beamish  
 by Isabella Frazer; that he was born on the 4th of January 1841,  
 and after the performance of said marriage between Samuel Swayne  
 Beamish and Isabella Frazer.

The case was argued, upon this special verdict, in the Court of  
 Queen's Bench, in Michaelmas Term 1855, when that Court gave



H. T. 1857. judgment for the defendant in error (the plaintiff below).

*Esch. Cham.*

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On this judgment a writ of error was brought into this Court.

*Napier* (with him *Radcliffe* and *Chatterton*) appeared as Counsel for the plaintiff in error, and—

*Gayer, Berkeley* and *Thomas Jones*, for the defendant in error

The following cases, authorities and statutes were cited and commented on by the plaintiff's Counsel: *Seldon Uxor.*, *Heb.*, lib. c. 1, p. 93; *ibid.*, lib. 2, c. 28, p. 216; *Swinburne on Spous.* pp. 9, 15, 197; *Hale Hist. C. L.*, pp. 4, 27, note e, 66, 15; *Bracton*, b. 2, c. 39, s. 4; *Britton*, p. 246; *Rogers' Eccl. La.* tit. *Marriage*; *Johnson's Eccl. Law*, A.D. 946; *Fitzh. Abr.*, tit. *Dower*, pl. 200; *Fitzh. N. B.*, tit. *Dower*; *Brooks' Abr.*, tit. *Dower*, pl. 81; *Fleta*, b. 5, c. 28, s. 4; *De Exceptionibus*, p. 353; *The Woman's Lawyer*, p. 117; *Proctor on the Book of Common Prayer*, p. 5; *Nicholas on Adulterine Bastardy*, p. 564; *Black Com.*, vol. 1, p. 433; vol. 2, pp. 133, 422; *Com. Dig.*, tit. *Bona and Feme*, b. 1, tit. *Fine*, E 6; *Taylor on Civil Law*, tit. *Marriage*, pp. 269, 280; *Lombard's Archaion*, p. 60; 1 *Willis Concilia*, pp. 217, 367; *Ayliffe's Parergon*, p. 364; *Buxtorf's Lexicon*, vol. 30, p. 78; vol. 4, p. 1103; 7 *Bingham's Antiquities of the Church*, b. 23, c. 4; 3 *Milman's Gibbon's Roman History*, p. 187; *Heinnecius Elementa Jur. Civ.*, b. 1, tit. 10, s. 14; *Zillenger Institutiones Jur. Eccl.*, b. 4, tit. 3, s. 69; *Sanchez's Matrimonio*, b. 3, disp. 17, p. 238; 2 *Coleridge English Dictionary*, p. 34; *Ballarm on Baptism*, b. 1, c. 7; b. 5, c. 46; *Finch's Law*, p. 19; *West's Symboleography*; *Boehmer Jus. Eccl.*, b. 4, tit. 1, s. 39; *Preface to 4 Rep.* 7; 2 *Coke Inst.*, p. 97; *Buller N. P.* p. 28; *Oughton's Ordo Judiciorum*, p. 28; *Canon of Winchester*, p. 1079; *Lyndwood's Provincialis*, b. 4, tit. 3; *School Ordinances*, p. 86; *Co. Lit.*, p. 34, a, 237, b; 1 *Corpus Juris Canon.*, p. 1184; 2 *ibid.*, p. 609; *Antient Laws as to Celibacy*, c. 18, s. 16; *Laws of Ethelred*, c. 5; *Alfric's Pastoral Letters*; *Institutes of Polity, Civil and Eccl.*, p. 437; *Reg. v. Millis* (a)

(a) J. & B.; S. C., Cr. & Dix; S. C., 10 CL & F. 534.

*Birthwistle v. Vardill* (a); *Mirehouse v. Rennell* (b); *Stowell v. Zouch* (c); *Wimbish v. Talbois* (d); *Del Heith's case* (e); *Foxcroft's case* (f); *Duchess of Kingston's case* (g); *Wigmore's case* (h); *Scrimshire v. Scrimshire* (i); *Hayden v. Goold* (h); *Norton v. Fenn* (l); *Rex v. Hodnett* (m); *Dalrymple v. Dalrymple* (n); *Rex v. Bathwick* (o); *Jolly v. Macgregor* (p); *Rex v. Archbishop of York* (q); *Escott v. Martin* (r); *Bacon's case* (s); *City of London v. Wood* (t); *Fairbrother v. Simmons* (u); *Holder v. Dickenson* (v); *Wright v. Ritchie* (w); *Sussex Peerage case* (x); *Fawcett v. Hall* (y); 1 *Causes Celebres*; *Catherwood v. Caslan* (z); *Holmes v. Holmes* (aa).

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The following statutes were also referred to by plaintiff's Counsel:—25 *H.* 8, cc. 21, 22; 31 *H.* 8, c. 14; 32 *H.* 8, c. 10; 2 & 3 *E.* 6, c. 21; 5 & 6 *E.* 6, c. 12; 12 *Car.* 2, c. 33; 11 *G.* 2, c. 10; 21 & 22 *G.* 3, c. 25 (*Ir.*); 57 *G.* 3, c. 51 (*Newfoundland*); 10 *G.* 4, c. 17; 6 *G.* 4, c. 68; 6 & 7 *W.* 4, c. 85; 24 *Car.* 2 (*Antigua*); *Dominica Law* for 1802; 7 & 8 *Vic.*, c. 81; 33 *G.* 3, c. 5 (*Upper Canada*); 1 *Burn's Colonial Law*, pp. 61, 158, 165, 167.

For defendant:—*Com. Dig., Baron & Feme*, b. 1, p. 546; *Fleta*, lib. 5, c. 28, p. 353; *Swinburne on Spousals*, pp. 15, 86, 132, 184, 193; *Bracton*, b. 4, c. 8; b. 5, c. 19; *Sanchez*, pp. 121, 199, 298;

(a) 7 *Cl. & F.* 926; *S. C.*, 2 *Cl. & F.* 577.

(b) 1 *Cl. & F.* 526.

(c) *Plow.* 357.

(d) *Ibid.*, 58.

(e) *Harl. M.S.S.* 2117.

(f) 1 *Roll. Abr.* 359.

(g) 2 *Sm. L. C.* 425; *S. C.*, 20 *How. St. Tr.* 538.

(h) *Holt Rep.* 450.

(i) 2 *Hag. Con. R.* 352.

(k) 1 *Salk.* 119.

(l) 2 *Doug.* 21.

(m) 1 *T. R.* 99.

(n) 2 *Hag. Con. R.* 54.

(o) 2 *B. & Ad.* 639.

(p) 3 *Wel. & Sh.* 148.

(q) 6 *T. R.* 494.

(r) 4 *Moo. P. C. C.* 123.

(s) 2 *Dyer*, 220.

(t) 12 *Mod.* 687.

(u) 5 *B. & Ad.* 335.

(v) *Freem.* 96.

(w) 2 *D. P. C.* 383.

(x) 11 *Cl. & F.* 108.

(y) *AL. & N.* 257.

(z) 13 *M. & W.* 264.

(aa) *M.S.S.* 1815, before *Dr. Radcliffe*.

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*Exch. Cham.* b. 2, p. 133; *Ayliffe's Parergon*, p. 364; 2 *Burnett's Hist. of*  
**BEAMISH** *Reformation*, p. 120; 1 *Inst.* p. 136, a; 2 *Inst.*, p. 687; *Bac.*  
**v.** *de Matrimonii Contractu*, c. 1, p. 3; *De Burgh's Treatise*, c.  
**BEAMISH.** 10 *Cl. & F.*, p. 182; *Martini de Antiquis Ritibus Eccl.*  
 vol. 3, p. 680; *Wilson v. Wilson (a)*; *Steadman v. Powell*;  
*Maxwell v. Maxwell (c)*; *Wickham v. Enfield (d)*; *Mac Adam*  
*Walker (e)*; *Leggett v. O'Brien (f)*; *Hawke v. Corri (g)*; *Asht*  
*v. Wrigley (h)*; *Yates v. Hall (i)*; *Fletcher v. Lord London*;  
*Honan v. Vereker (l)*; *Hayden v. Goold (m)*; *Drew v. Le*  
*Norbury (n)*; *Weld v. Chamberlayne (o)*; 31 *H.* 8, c. 14; 1 *E.*  
 5 & 6 *E.* 6, c. 12; 12 *G.* 1, c. 3; 19 *G.* 2, c. 13.

*Cur. ad. vult.*

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KEOGH, J.—[Having stated the facts, proceeded to say]:—The question for the Court, upon these facts, is—whether the plaintiff is the legitimate son of the Rev. Samuel S. Beamish?—for, if so, he is clearly entitled to recover the lands, as the grand-son and heir-at-law of Dr. Beamish; but on the contrary, if he be not legitimate then the title of the defendant is established. In the words of the marriage ceremony, stated in the special verdict—If the marriage was a valid marriage, then the plaintiff is entitled to recover; if invalid, the judgment should be for the defendant.

This question has been argued with great ability and learning upon both sides; and if anything was omitted in the arguments of the learned leaders for the plaintiff and defendant in error, it has been supplied, with point and vigour, by the Junior Counsel, Mr. Chatterton and Mr. Jones, who condensed in a short compass whatever was most forcible on either side. But although the real

(a) 5 H. L. Cas. 63.

(c) Milw. 290.

(e) 1 D. P. C. 181.

(g) 2 Hag. 288.

(i) 4 T. R. 81.

(l) 10 Ir. Law Rep. 64.

(n) 3 Jon. & L. 284.

(b) 1 Ad. Con. R. 64.

(d) Cro. Car. 351.

(f) Milw. 333.

(h) 4 Bro. C. C. 136.

(k) 3 Bing. 569.

(m) 1 Salk. 119.

(o) 2 Show. 300.

Counsel has induced them to take a very wide range, and to call our attention to a vast array of writers upon the Marriage Law—not of England only, but of the rest of Christian Europe—some of them authorities, many of them not so, it occurred to me during the argument, and I see no reason to alter my opinion, that much, if not the entire, of this learning, was beside the present question; and that our inquiry into this case is materially limited, and must be to a great extent controlled, by the decision pronounced by the House of Lords, in the case of *The Queen v. Millis*. That was a decision of the highest Court of Judicature, from which there is no appeal, and by which every inferior tribunal (and this Court is to that inferior) is bound; and although the Law Lords were then equally divided, upon the principle "*presumitur pro negante*," I consider that I have no right to go behind it, any more than I would have to canvass the weight to be attached to every conflicting opinion, even if it was supported, as it is, by the unanimous decision of all the Judges of England. It was there held, and the law by that decision undoubtedly is, that no marriage ceremony can be valid, "no religious celebration"—I use the language of Tyndal, C. J.—could be sufficient to constitute a valid marriage, unless it is performed in the presence of an ordained minister; that is, with the presence and intervention of a minister in episcopal orders.

I confess, with this judgment before me, I thought that very much of the argument of Counsel, erudite and elaborate as it was, either was counter to, or was rendered unnecessary by, that decision; for instance, it strikes my mind, that the whole of that elaborate argument addressed to us, that the consent of *two parties*, expressed in words of present *mutual acceptance*, without the intervention of a priest, constituted a legal marriage by the Common Law of England, has been disposed of by this decision in *The Queen v. Millis*; and it appeared to me idle to attempt to shake our belief in the authority of that decision, on that point at least; for whatever our opinion might be as to the reasons on which that authority was based (and I, for one, may be excused for presuming to express my concurrence, not only in the decision, but in the reasons assigned for that

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H. T. 1857. decision), we are all bound to  
Esch. Cham. cite any authority beyond the  
BEAMISH marriage can be valid, by the  
v. BEAMISH. between two members of the  
presence and with the interv  
Indeed I think that the Counsel  
conclusion at which the Court wo  
on the one hand, very wisely, as  
upon this decision, and contended  
Common Prayer, or rather referring  
in order to obey and carry out that  
assailable. The defendant in error,  
bringing under our notice all the cas  
been relied on in *The Queen v. Mills*  
the House of Lords to decide that case  
thus to shake our confidence in that deci  
by Counsel, to induce us to make some so  
a judgment we were bound to obey; yet  
the argument of defendant's Counsel, they a  
to the binding effect of *The Queen v. Mills*  
they were within not only its spirit, but its  
fore, the judgment in the present case sh  
fact, it being decided that the presence and in  
in holy orders is necessary to the celebration  
the defendant says the marriage here was valid  
the first place, a solemn engagement, between  
defendant and the Rev. S. S. Beamish, to take each  
and wife, and in addition to that contract, was  
ceremony performed according to the service of  
England, by a minister in holy orders of that chu  
one of the contracting parties, the Rev. S. S. Beamish  
Now I confess, to my mind, uninstructed as I freely  
be, except so far as I have collected information from the  
in this case, and the authorities to which I have been refe  
structed by the lights of Ecclesiastical Law, this appear  
startling proposition; for certainly nearly a thousand years

T. 1857. *decisions*, on *an appeal* by positive constitutions, for the constitutions of H. T. 1857.  
*Ch. Cham.* *case any authority* *Esch. Cham.*  
*the statutes published by the Record Commis-*  
*marriage can be said to* 109), carry us back to the year 940, that "at  
*between two members of a* shall be a mass priest by law, who shall, by God's  
*presence and with the* their union to all prosperity." And in the year  
*Indeed I think that the* after the Conquest, the canons at Winchester were  
*conclusion at which the* franc in these terms:—"Further, it is ordained that  
*on the one hand, very* join his daughter in marriage without the priest's  
*on this decision, and* other marriage shall be deemed fornication." And in  
*mon Prayer, or rather* hundred years later, there was another canon, and, be it  
*ler to obey and carry* recognised and adopted by the Common Law of England,  
*de. The defendant is* :—"Let no faithful man, of what degree soever, marry  
*under our notice all* out in public, by receiving the priest's benediction."  
*on in The Queen* . Canons of our law, and have been acted on throughout  
*Lords to decide the* course of our history down to the latest period, and so  
*our confidence in the* have been by the highest tribunal. They have survived  
*induce us to make* of the conflicts of centuries, civil and ecclesiastical, the  
*were bound to obey* complete dominion in this realm of England by the Papal  
*endant's Counsel, the* the unreserved introduction of the general canon law of  
*of The Queen* . Thanks to the successful struggles of our Catholic ancestors.  
*only its spirit, but* seem strange that those canons, simple, intelligible and  
*the present can* have been preserved to our own time unaltered, even at the  
*the presence of* ion, as regards this country; passing strange that this  
*to the celebrant* e satisfied in the person of a priest in holy orders, by his  
*riage here was* g himself clandestinely, without the intervention of any third  
*gement, being* priest or layman, and thereby violating all the ordinances of  
*mish, to take* ch; and I adopt the language of the Counsel for the plaintiff  
*contract, as* :—"Making use of the ceremonies, the prayers, the invo-  
*the service* ns prescribed in the most solemn part of that most impressive  
*s of that* ice of the Church of England, in a manner amounting to ab-  
*S. S. Bea* te blasphemy."  
*ed as I fit* e authority of the Book of Common Prayer is not disputed,  
*ation from* ould it be, established as it is by positive Acts of Parliament;  
*ave been* the Act of 2 & 3 *Edw.* 6, in England, and 17 & 18 *Car.* 2, in  
*; this* land. Nor is it contended that the service of marriage there  
*thous* escribed, to which I shall refer, could have been, in this case,

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performed without grave and serious alteration. But it is said that marriages have been held valid where admittedly there have been departures from the prescribed forms, and serious would be the consequences to families and to society if innocent parties were to be held responsible for the faults or sins of omission or commission of the ministering priest in the service of marriage. The force of this remark cannot be gainsayed; and perhaps the strongest cases in which the departure from the law has been upheld is that in which the person celebrating the marriage, though holding himself out to be a priest in orders, really was not so, and yet the marriage has been held good, because of the innocence of the parties and for the safety of society: *Hawke v. Corri* (a); *Weld v. Chamberlain* (b). But is this the case before us? If this marriage is upheld, it must be because of the act of one of the parties, who was knowingly and wilfully a transgressor in his sacred calling, against all those laws, which he, above all others, was bound to maintain; whereas, I believe, the cases of marriages upheld where banns were not published, or license obtained, or the ring not given, or the forms not observed, were all so upheld because of the innocence of the contracting parties; for that case of *Holmes v. Holmes*, before Dr. Radcliffe, cannot be firmly relied on as an authority on either side, in which the law has even contemplated, much less authorized such an entire departure, not only from the letter, but the spirit of the Book of Common Prayer, as the validating of this marriage demands. Departures from the forms in the Book of Common Prayer have been allowed and sanctioned by the law and authorities; and this I am not surprised at, for I can find reasons for such allowances even in the book itself. The preface to the Book of Common Prayer, prepared as it was in the best period of our language, points to such alterations, and I will read the passage. It states:—"We find that in the reigns of several princes, of blessed memory, since the Reformation, the church, upon just and weighty considerations, her thereto moving, hath yielded to make such alterations in some particulars as in their respective times were thought convenient, yet so as that the main body and essentials of it (as well as

(a) 2 Hag. Con. R. 280.

(b) 2 Show. 300.

“the chiefest materials, as in the frame and order thereof) have  
 “still continued the same unto this day, and do yet stand firm and  
 “unshaken, notwithstanding all the vain attempts and impetuous  
 “assaults made against it.” But did the writer of that preface ever  
 imagine that the impressive and solemn language of the marriage  
 cremonial, which I shall presently read, should be so mocked, dis-  
 torted and blasphemed, as it must needs have been by the Rev.  
 S. S. Beamish, if he did, as we must take it upon this special verdict  
 he did, attempt the recital of the marriage service? What must he  
 have first done? He is to say:—“Dearly beloved, we are gathered  
 “together here in the sight of God, and in the face of this congrega-  
 “tion, to join together this man and this woman in holy matrimony.”  
 And to the persons that shall be married, he is to say:—“I  
 “require and charge you both, as you will answer at the dreadful  
 “day of judgment, when the secrets of all hearts shall be disclosed,  
 “that if either of you know any impediment why you should not  
 “be lawfully joined together in matrimony, ye do now confess it.”  
 Can anything be more solemn? Are these requirements to be  
 wholly set at nought?—the entire intention of the framers of that  
 book defeated?—by whom? By a minister of the church for  
 which that book was made, and whose duty it was to follow and  
 obey it. For what object was the minister present? A similar  
 question was asked in *The Queen v. Millis*; and Tindal, C. J., ob-  
 served:—“It might be sufficient answer to say, to marry the  
 “parties; perhaps any further answer is unnecessary; but it occurs  
 “to me that the words of modern statutes, requiring witnesses in  
 “addition to the minister, seem to justify the argument that he was to  
 “be present as a witness. I believe, however, it had a more solemn  
 “origin. I think that the Church of England, all the more in con-  
 “sequence of marriage having ceased to be treated as a Sacrament,  
 “as it is in the Roman Catholic church, required the presence of a  
 “priest to prevent that which, in the language of Lord Stowell,  
 “‘should be regarded as the most sacred institution,’ from passing  
 “into a mere civil contract.”

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But it is said that some such alteration must be made in the  
 Communion service, which is one of the Sacraments of the Church



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of England. I have looked into this part of the church service, and I find no such analogy between the two services. If, then, an analogy for such a departure is to be found in the Book of Common Prayer, upon what authority can this marriage be sustained? Where, in any of the books, is there a case in which so monstrous a prodigy in law and religion has been upheld? In considering this question, in *The Queen v. Millis*, great and eminent persons trained in every description of learned lore, not confined to legal learning, but thoroughly acquainted with the history, civil and ecclesiastical, of this country, from the earliest periods (I allude especially to Lord Brougham and Lord Campbell), sought to establish this position, that the intervention of a priest was not necessary, yet failed to adduce a single instance in which a marriage such as this had been held good by the law of England—nay, more, it never occurred to their minds to suggest the probability of such a case as the present. Anxious they were, no doubt, to maintain the principle established by Lord Stowell as Scotch law, to be the law of England; great motives moved them—the desire of uniformity, the fear of consequences. To ascertain the state of this law, they were carried back to periods antecedent to the Reformation, and most of the authorities were taken from times when the Church of England was in communion with the Church of Rome. It was then that the Common Law of England adopted the ordinances of the Church of England, requiring the presence of a mass priest to constitute a lawful marriage. That law was recognised by our Saxon ancestors in the year 940, a century before the Normans set foot in England. It was established after the Norman conquest. It was not changed, but, as I read the Book of Common Prayer, re-enacted at the most solemn period of the history of the church of England, under Edward 6, and carried forward at every period, save one, the short interregnum of the Commonwealth. It was recognised after the Restoration, and is now finally declared by the decision of the House of Lords, a decision which would, in my humble judgment, be entirely without reason or justice to support it, if, in the case of the marriage of a clergyman, it could be satisfied by his own act, although that very act is admitted to be a gross and scandalous violation of his ecclesiastical duty.

But if the House of Lords, in order to arrive at their decision, had carefully to consider the state of the Ecclesiastical Law in Roman Catholic times, as to the ceremony of marriage, may we not, in this case, have a similar inquiry into the state of marriage itself, and the persons who were allowed to marry, at the same periods? I have already referred to the constitutions of *Edward*. The very first institute of that King will be found to enjoin that a mass priest should be chaste, that is, as a reference to the history of the period will show, that he should lead a life of celibacy. Against this institute the clergy struggled; but ultimately, it is beyond doubt, that so early as the year 1015, priests were, in the Church of England, forbidden to marry, and in the year 1073, obliged to take the vow of celibacy. The statute 1 *Hen.* 7, c. 4, clearly shows that down to that period the marriage of a priest was unknown to our law; and the statutes, 31 *Hen.* 8, c. 14, and 32 *Hen.* 8, c. 10, repealed by 2 & 3 *Edw.* 6, c. 2, going to the extent of making the marriage of a priest felony, demonstrate that such a union was unknown to the Common Law. Well then, if this be so—if the law of England, a century before the Conquest, and from that period down to the Reformation, never contemplated, but on the contrary, by express provisions, forbad the marriage of priests at all; and if, side by side with those provisions, run the stream of authority establishing that the presence and intervention of a priest was necessary to make a lawful marriage, the law throughout intended a third person, the presence and intervention of a third person; and surely that presence and intervention could not embrace, include or intend the marriage of a priest by himself, for no such marriage by himself was within their purview. In my mind, all the exceptional cases which have been mentioned, the law of the Commonwealth, the Act of *Charles*, validating marriages then celebrated, the Colonial statutes dispensing with the ministration of a priest, the cases of the Jews and Quakers, the cases in which a marriage by a person falsely representing himself to be a minister, the position laid down in *Hawke v. Corri*, all with more conclusiveness, by their very exceptional character, fortify and maintain the position of *The Queen v. Millis*; and although cases

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may be pointed out, such as *Foxcroft's case* and *Del Heille*, where, though a priest was present, the marriage was held which would seem to go farther than the law is at present to be, yet I believe all these difficulties disappear, by steadily before us this proposition, enunciated by Chief Justice Tindal, "That whatever at any time has been held by the Church of England to be a sufficient religious ceremony of marriage, the same has, at all times, satisfied the Common Law of England in that respect; but that at no period of our history will it be found either that the Church of England has held a religious celebration sufficient to constitute a valid marriage, unless it was performed by an ordained minister, or that the Common Law has held a marriage complete without such celebration." The Church of England, no doubt, since the reign of *Edw. 6* & *Eliz.*, allows her clergy to marry; but the Church of England, I say it with great respect, is not, as some have flippantly misrepresented her to be, a negative Christian church; she has not bounded her existence on the mere denial of what went before; what she thought proper to change she altered; what she did not alter remains, unless the contrary be shown, and, I say, continued to be the law of the Church of England, and, as such, was adopted and recognised by the Common Law. The law of marriage is so far altered that a priest may marry; but I say that can only be lawful matrimony which, in the language of *5 & 6 Edw. 6, c. 12*, repealed by *1 Mary*, and revived by *1 Jac., c. 25*, shall be duly had, celebrated and made; and that, I say, is with the intervention of a priest in holy orders, who, with submission to the great learning and experience of my Brethren who decided this case, and of those who are to decide otherwise, I submit, cannot be the contracting parties.

I am told that this is a matter which may not fall into a precedent for that now all marriages must be in the church. I do not think so; but even so, I should arrive at the same conclusion. I believe the conclusion to be consistent with common sense and justice, and that it will contribute to the good order of society, and sustain the sacredness of the marriage rite, which is, in my opinion, the very pivot of a well-regulated community. I believe, too, that it is in accordance

with the law, and the reason and policy of the law, and reconcileable at all points to the plain untortured meaning of the judgment of the House of Lords, in the case to which I have referred; and I am therefore of opinion that judgment should be for the plaintiff in error.

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GREENE, B.

The question in this case is, whether, according to the law of Ireland (which is the same as that of England was before the passing of the English Marriage Act, 26 G. 2, c. 33), this marriage was valid? The Court of Queen's Bench, consisting of three Judges (my LORD CHIEF JUSTICE not having been present), determined that it was—one of the Judges of that Court holding that a contract *per verba de presenti* between a man and a woman, to take each other for husband and wife is, *per se*, sufficient to constitute a complete and perfect marriage in point of law. The other two Judges, however, do not appear to have acted upon this broad proposition; but, assuming and considering that the intervention of a clergyman would be required, they held that the exigency of the law in this respect was satisfied. They treated the marriage as irregular only, and not void.

When the case was first argued before us, it was not contended on the part of the defendant in error, that a mere contract *per verba de presenti* would have been sufficient, had Mr. Beamish been a layman; it was, on the contrary, conceded, that since the decision in the cases of *Regina v. Millis* (a), and *Catherwood v. Caslon* (b), such contract would not have been sufficient. On the second argument, however, it was broadly asserted that *Regina v. Millis* had decided nothing—the Law Lords in the House of Lords having been equally divided in opinion. The prisoner, Millis, was acquitted by a judgment of the Court of Queen's Bench, and that judgment was affirmed by the House of Lords. If the proceeding in the Court of Queen's Bench was not a judgment against the validity of the marriage, I am at a loss

(a) 10 Cl. &amp; Fin. 534.

(b) 13 M. &amp; W. 261.

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to account for the passing of the Act 5 & 6 Vic., c. 113, immediately after that proceeding, validating marriages by Presbyterian clergymen, evidently pointing to the decision in *Regina v. Millis*. And by the subsequent Act of 6 & 7 Vic., c. 39, the like confirmation is given to marriages of the same nature had *since* the passing of the Act of the preceding year. These are *enacting* and *declaratory* statutes. To say that there was no judgment of the House of Lords, is to say that George Millis is liable to conviction on the indictment. There is a judgment on record in the House of Lords. The Court of Exchequer in England treated the judgment as a decision, and conclusive, and so must we; and I add that, *since* the judgment in the House of Lords, the Legislature again confirmed such marriages as that of Millis—for, by 7 & 8 Vic., c. 81, s. 13, a similar enactment is made. The Legislature have thus themselves recognised the case of *Regina v. Millis* as establishing the antecedent law. All we have to do, therefore, is to examine what the case of *Regina v. Millis* establishes, and in my opinion, is this: that it is essential to the validity of a marriage at the Common Law in Ireland, that some religious ceremony or solemnity shall be performed or take place in the presence, and with the intervention of, a minister in holy orders.

The only question with which we have to deal is, whether the rule of the Common Law has, in its true spirit, substance and meaning, been complied with under the circumstances detailed in this special verdict; that is, whether the ordained minister, whose presence and intervention are thus required, may be, as Mr. Beamish here was, the husband himself? It is to be recollected that the marriage in *Regina v. Millis* was held *void*, and not merely *irregular*, that is, that if there be not the presence and intervention of a clergyman, the marriage is a *nullity*; so that if the clergyman who officiated in this instance was not such a person as ought to have been present and intervenient, within the true meaning and intent of the rule, the marriage was not a valid though irregular one, but was absolutely void. In every instance which I have been able to discover, where the validity of a marriage solemnised by a minister or person in holy orders has been the subject of discussion,

such minister has been, or been considered as, a third party, not as here, a person filling the character as well of husband, or contracting party, as also of solemniser of the marriage rite. The possibility of such a state of facts as we have here to deal with does not appear to have been ever contemplated, nor is the remotest allusion made to what would be the law in such a case. This circumstance is not without some degree of weight in a question with respect to which usage and custom must, to some extent, be taken into consideration in aid of inference and analogy.

We must start, as I conceive, with the exposition of the Common Law by the Judges in England through Lord Chief Justice Tindal, and sanctioned by the House of Lords, in *Regina v. Millis*, namely, that it is essential, in order to constitute a legal marriage, not merely that a man and woman shall *contract* to become husband and wife, but that some religious ceremony shall be *superadded*—that is, the contract and the solemnity are to be, as it were, distinct; that the one should be added to the other. Chief Justice Tindal evidently supposes the contract and the religious rite not to be identical. Adverting to the obscurity in which the question was involved, he thus expresses himself (a):—"It may well become us, the Judges of England of the present day, when for nearly a century the whole doctrine relating to *contracts* of marriage, as contradistinguished from *marriage itself*, has become nearly a dead letter in our Courts, to confess that the subject is involved in still deeper obscurity than in the time of our predecessors, and to confess ourselves unable to trace out and define the boundary between the contract and the marriage itself with absolute certainty." Having thus expressly and pointedly taken the distinction between the contract and the religious sanction which is to be *superadded*, and stated that there must be *both* the civil contract and the religious ceremony, he says, that the former, namely the civil contract, has always remained the same; but that the latter, namely, the religious ceremony, has varied from time to time, according to the variation of the laws of the Church. Of these variations

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(a) 10 Cl. & F. 654.

H. T. 1857. he cites instances, and draws the conclusion that the law of  
*Esch. Cham.* land in these particulars has followed that of the Spiritual Courts.  
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 v. general Canon Law of Europe, still less by the Civil Law, but  
 BEAMISH. solely by the King's Ecclesiastical Law, as established and administered in England. Such also seem to have been the opinions of the Lord Chancellor and of Lord Cottenham (a).

This being so, we must endeavour to discover what, according to the Common Law, thus influenced and modified by the doctrine and usage of the Ecclesiastical Courts, is the *meaning* and *scope* of the rule which requires that there shall be a celebration of marriage by a person in holy orders. Let us first examine what was understood by it in *Regina v. Millis*. In the judgment before my Brother CRAMPTON states, that it appeared to him that the Judges who presided in *Regina v. Millis* would have decreed the present marriage good. With the greatest respect for his opinion I feel compelled to say, that I draw a different conclusion from these expressions. It appears to me that every Judge who pronounced any opinion in that case, as well those who admitted, as those who denied, the rule, understood that rule to be—that the presence and intervention of a third party was the thing contemplated and intended by it. When a contract or act between the parties is said to be incomplete or invalid, unless there be the “intervention” or “presence,” or “ministration,” of a clergyman; or when it is said that no marriage is good unless it be “before” a clergyman or unless a priest shall be “at” the nuptials, or unless they be celebrated “by” a priest or “*per Presbyterum*,” or “*coram Sacerdote*,” or with the “interposition” of a priest—when these and similar expressions are used, the natural construction and inference is, that those who so speak refer to some person other than and different from those who contract. To some of those expressions I shall presently advert; but before I do so, I shall trace, so far as my research has enabled me to do, the history, policy, and objects of the rule, and the understanding which has prevailed as to its

(a) 10 Cl. & F. 876.

construction, with the view of considering how far what has taken place in the present case is a substantial, even though a literal, compliance with it.

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Originally it was held that marriages ought to be celebrated *in facie ecclesiæ*, and that otherwise they were not valid, that is, in the church: *Foxcroft's case* (a). The reason of this, as I collect, was that the church was to witness the ceremony which was to be performed by the priest or minister, as its representative. There must have been a person in holy orders, and a ceremony in the church. This, I think, clearly meant that the minister was to be a third party. This strictness, it is true, was subsequently relaxed, so far as relates to the place of celebration, as appears from *Weld v. Chamberlain* (b), where words repeated after a person in holy orders were held to be sufficient. This case, whilst it determined that parties need not be married in church, manifestly implies that the minister whose words are to be "repeated" is to be a distinct person from the husband; and in every case where a marriage, though irregular, has been sustained, the clergyman appears to have been a third party. In *Haydon v. Gould* (c), it is stated that the constant form of pleading marriage is "*per presbyterum sacris ordinibus constitutum*." Chief Justice Tindal (d) understands this to mean, that there must be the *presence* and *intervention* of a priest. Now, if I am asked would Chief Justice Tindal have said that in this case there had been such presence and intervention, whether he would have considered this marriage to have been *duly* celebrated by Mr. Beamish in his own presence, and through the intervention of himself, I should unhesitatingly say that he would not. Again, in page 667, he thus expresses himself:—"When it is asked, what had the priest to do, or what had he to say? the answer must be that *he* married *them*, and, in so doing, used such form of words as were customary at the time of performing the ceremony." Can any doubt that Chief Justice Tindal is here speaking of *three* persons?—"he" is to marry "them," viz., the man and the woman. Nay, the very question which he thus

(a) 1 Roll. Abr. 359.

(b) 2 Show. 300.

(c) 1 Salk. 119.

(d) 10 Cl. & Fin. 667.



H. T. 1857. answers necessarily implies as much; for no one could ask so absurd a question as, what is the priest (*i. e.*, the husband) to do? what is the priest (*i. e.*, the husband) to say? The question supposes necessarily that the priest is not to be the contracting party; otherwise the absurd inquiry would be, is the contracting party to say or do anything? No rational person would put such a question. Again, in p. 682, in citing the decree of the Council of Winchester, A. D. 1076, which was, that a marriage without the benediction of the priest should not be good, it is plain that Chief Justice Tindal understands the priest to be a different person from the husband; so also in page 581, in the passage quoted from De Burgo's book: "*De ministro hujus sacramenti notandum est quod non requiritur alius minister distinctus ab ipsis contrahentibus,*" and "*Putet etiam quod ad collationem hujus sacramenti non requiritur ministerium sacerdotis, et quod illa benedictio sacerdotalis, quanquam solet presbyter facere sive proferre super conjuges, sive aliae orationes ab ipso prolatae, non sunt forma sacramenti nec de ejus essentia.*" No doubt can be entertained that the minister referred to is a third party: the passage merely states that the presence of the priest is not necessary to confer upon the marriage the character of a sacrament, for that the parties themselves do; but observe that the question, in referring to the priest, calls him *distinctus*. So in the passage "*Inhibetur est contrahere nuptias occulte sed publice coram sacerdote, nec nuptiae in Domino contrahendae.*" Would such a marriage as that celebrated by Mr. Beamish be good within this rule? Would it be *publice coram sacerdote*?

Let us now see what Lord Brougham's view of this matter would probably be, judging from his language, when arguing against the necessity of a minister. What was his construction of the rule that there must be a minister? He describes the marriage *per verba de presenti* as one at which no priest assisted; and again, as a marriage "without the intervention of the church or its minister" (p. 701). It is manifest that he treats the minister as the representative of the church; so, at p. 706, "A contract to take one another for husband and wife is only a contract to live as such, and it is identical

“tical with the same contract repeated before a priest, and with his  
 “aid.” Can it be supposed that by “priest” here his Lordship  
 means “husband,” although he be a priest? In p. 717, he again  
 uses the words “sacerdotal presence and aid.” Aid to whom?—  
 To the contracting parties. In p. 719, he speaks of the “inter-  
 “position of the sacerdotal office, or the presence of any one in holy  
 “orders,” intimating that the priest attends in his *official* character.  
 Again, “the church was always anxious to interfere.” It seems  
 to me that it would be rather strange to call a clergyman’s marriage  
 of himself the interference of the church.

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Lord Abinger, in like manner, understands the law, as expounded  
 by the Judges, to be, that by the Ecclesiastical Law the presence  
 of a person in holy orders is necessary. Lord Campbell thus  
 expresses himself (p. 741):—“Were a priest in orders to be  
 “*accidentally* present at a betrothment, it would not be *ipsum*  
 “*matrimonium*.” Is it to be supposed that Lord Campbell could  
 refer to one of the parties to the contract as being *accidentally* pre-  
 sent? He subsequently states (p. 741) the question to be, whether  
 a marriage can be valid without the presence of a person in holy  
 orders? (p. 750); and, adverting to the decree of the Council of  
 Trent, he says (p. 753):—“Even under the decree, the priest is  
 present only as a witness.” I do not see how Lord Campbell could,  
 consistently with the doctrine laid down by him, hold, in such a  
 case as the present, that assuming a priest to be necessary, that  
 priest may be the husband. I do not understand any person’s being  
 a witness to his own act. So, in alluding to the practice of the  
 Church of Rome, he says:—“That church was most anxious that  
 “marriages should be celebrated publicly, in the presence of a  
 “priest; first, for the laudable purpose of preventing improvident  
 “unions; and secondly, for the excusable purpose of exacting  
 “fees from the faithful.” The “priest” here referred to cannot  
 be the bridegroom, as appears from the word “publicly;” besides  
 which, neither publicity nor the exaction of fees could be the result  
 of a clergyman marrying himself.

What is the language of Lord Denman? He considers the  
 intervention of a priest to have been required, in order to insure

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 BEAMISH. the clergyman may marry himself, as Mr. Beamish did in the present case. Again, commenting upon the Municipal Law of King *Edmund*, he says :—" They prescribe what shall be done though most imperfectly ; they require the presence, at the ceremony, of a mass priest—a description not very intelligible as explained as meaning a priest in holy orders, *presbyterus sacri ordinibus constitutum*. This priest is not required to take any part in the proceedings. This is quite consistent with the position that the want of notoriety was the evil to be remedied and that the remedy would be found in the presence of the most respectable neighbour to attest it, and if one belonging to the only lettered class, by whom it might be recorded ; but hard to reconcile with the notion that a religious rite was essential to the validity of the contract." Here Lord Denman actually uses an argument why no religious rite was essential to the contract, that the purpose for which the laws of King *Edmund* required the presence of a priest was, in order that the priest should attest and record the marriage. I cannot bring myself to believe that Lord Denman considered, or would consider, that the rule requiring the presence of a priest—if it were a rule—would be satisfied by a priest and a woman marrying without the presence of any other person. Further (p. 812), he argues against the necessity of the intervention of a priest, by stating that in early ages the attendance of a priest might be impossible, or might be improperly refused, and that the marriage ought not to depend upon his caprice—reasoning utterly incapable and unmeaning, except upon the supposition that some person different from the husband himself is contemplated. Lord Denman therefore, as well as Lord Campbell, appears to me to differ altogether from the view stated to have been taken by the Court of Queen's Bench—namely, that it was not in the character of a religious ceremony that the priest was called upon to intervene.

Let us now see what the Lord Chancellor's understanding of the matter was. He refers to a learned book, published in the year 1632, entitled "*The Woman's Lawyer*," which sums up the written views of the laws in these words :—" On earth, if the priest were

celebrated marriage, the Judge saith no legitimate issue" (p. 848); H. T. 1857. That is, unless the priest be satisfied of the marriage, the law does not recognise it. Could this mean that the husband shall see or be satisfied of his own marriage? And again:—"Originally it (the marriage) ought to have been in the church. The ceremony is well known: it had been in use for many hundred years, and corresponded in substance with the present form." And he quotes Lyndwood's explanation of "*in facie ecclesie*"—namely, "*in conspectu ecclesie, populi scilicet congregati in ecclesia*." It appears clear to me that the Lord Chancellor, in these passages, looks upon the priest as witnessing the ceremony; and such, also, I think, was Lord Cottenham's opinion; for we find him, in p. 877, defining a marriage by a priest:—"The intervention of an ecclesiastical authority;" that is, the priest is present in an official or authoritative character—in other words, a character independent of, and essentially distinct from, the character of a contractor. From all these expressions of the several Judges in *The Queen v. Millis*, it appears to me that both those who supported and those who opposed the opinion that the Common Law requires the intervention of a minister in holy orders, understood that requisition to be, that the minister is to be a third person, and that not one of them supposed that he might be the husband.

I now come to the inferences fairly to be drawn from the language of other authorities, and the expressions of text-writers. By the institutes of *Edmund*, the duty of the mass priest was "*adunare*" the parties. So in *Lyndwood* (a):—"Ne dent sibi fidem mutuo de matrimonio contrahendo, nisi in loco celebri coram publicis et pluribus personis ad hoc convocatis." *Sanchez* (b) states the priest to be there, "more in the character of a witness than of an officer;" and *Sanchez* requires him to "receive the declared consent of the respective parties, and not to put the form of consent into their mouths, and ask them if they adopt it." Here a third party is clearly intended. *Zallinger* (c) says:—"Munus parochi matrimonio assistentis situm non est in actu quodam ordinis, aut exercitio propriæ jurisdictionis, sed in præsentia ipsius tanquam

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(a) B.4, tit. 1, 271.

(b) B. 3, 297-8.

(c) 10 Cl. & Fin. 603.

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*Exch. Cham.* "*det ecclesiae*,"—showing that the priest attended as the representative of the church, or its delegate, and in a character quite distinct from a party to the contract. This is quite inconsistent with the notion that the priest was not intended as a witness. What is the meaning of "*specialiter autorizati*?"—authorised by the church, accredited as its representative, accredited to the party. Who is to give testimony to the church? Is it the same person? Manifestly not. The canon of 1175 (a) is:—"Let a faithful man, of what degree soever, marry in private, but public, by receiving the priest's benediction." The husband can receive the benediction from himself. And as cited from the constitutions of Archbishop Reynolds:—"Let the priest often attend such as are disposed to marry, to plight their troth anywhere but in some notable place before priests" (b). The canon of Lambeth in 1070, contains this injunction:—"Let no man give his daughter or kinswoman in marriage without the priest's benediction." Could this mean the benediction of the party to whom the daughter is to be given? In a decretal epistle of Pope Evaristus, in the second century (d), the decree is:—"Incestum haberi consuevit cui sacerdos non adfuisse consecrassetque." In *Selden Ux. H.* lib. 2, c. 28, p. 212, is this passage:—"Ipse contractus solummodo a contrahentibus, nec praeunte et interveniente antistite, nec ministro sacro, fiebat: subinde autem is solebat, sacrorum gratia cum reliquis quorum praesentia habita, ne clandestinum fore matrimonium." The words, "praeunte" and "interveniente" seem inconsistent with the idea that the husband and the "antistite" may be one person. And referring to Pope Evaristus' decretal quotes thus:—"Non fit conjugium nisi sponsa, &c., et suo tempore sacerdotaliter (ut mos est) cum precibus et oblationibus a sacerdote dote benedicatur." In p. 213, *Selden* infers from the decretal:—"Benedictionem sacram, eamque a sacro ministro praestandam nuptiis necessario in Christianismo semper adhibendam." As in p. 214, citing *Firiccius* (A. D. 390):—"Illa benedictio quae

(a) 10 Cl. &amp; Fin. 617.

(b) *Ibid.* 619.(c) *Ibid.* 640.

(d) Br. Hus. &amp; Wife, 208 n.

nupturæ sacerdos *imponit*." So p. 215 :—"Nec tamen omnino  
 "evincitur, *ipsi contrahendi actui* sacrum necessario *interfuisse*  
 "ministrum." All these passages clearly imply the intervention of  
 the priest as a third party. In referring to the fourth Synod of  
 Carthage (A. D. 398), *Selden* thus quotes from it :—"Sponsus et  
*sponsa* cum benedicendi sunt a sacerdote." In like manner the  
 heading of the 88th canon, *apud* Spelman, is—"Quomodo bene-  
 dicendi sunt sponsus et sponsa." From this canon, *Selden* (p. 216)  
 deduces this proposition—"Contrahatur matrimonium in præsentia  
 sacerdotis," and "nuptias non solum a sacro ministro solere sed et  
 "ejusdem interventu contrahi; aut contractum ante a sponsis  
 "initum, denuo, *ipso præeunte* celebrari;" præeunte; i. e., that  
 the "sponsi" (both) should follow the priest. He must, therefore,  
 be different from either. "Non quod solennia hæc sacra adeo  
 "necessionum in foro interno, ut aiunt, matrimonio haberetur,  
 "ut citra hoc initum aut nullum æstimaretur aut non plane  
 "validum, quod libero consensu factum." And in a subsequent  
 place he uses the words "*adhiberi* ministrum," and "nisi *adsit*  
 minister." In the passage from *Sanchez* (a), which treats of the  
 question whether marriage be a sacrament unless there be a minis-  
 ter, the minister with reference to whom the point is argued must  
 be a third party, as is to be implied from the very question itself.  
 The like inference is to be drawn from the language of *Sanchez*  
 (p. 121), as to the words to be used by the minister—"Ego vos  
*conjungo*;" as also from his words (b) :—"Non debet interesse  
 sacerdos." *Lyndwood Provinciale* (p. 273), referring to the pro-  
 hibition to clergymen to officiate at marriages without previous  
 banns, in *note a*, with respect to the words "interesse," gives this  
 reason :—"Sacerdotis namque non debent interesse actui qui  
 "geritur contra jura similiter nec testis testamento usuarii  
 "manifesti." Here the priest is considered in the nature of a wit-  
 ness. *Ayliffe's Parergon* (p. 364) refers to the canon as requiring  
 the married persons to receive the benediction of the priest. He  
 says, that though marriage was by the Canon Law interdicted to  
 the clergy, yet that law was not received in England, for the

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(a) 21 *Lib. 2, Disp. 6.*(b) *Lib. 7, Disp. 106.*

H. T. 1857. British clergy had their wives when the Saxons ruled here; and he says that the priests in England kept their wives long after the Conquest. If this be so, the rules relating to marriages would apply to them; yet we have no allusion made in any authority of that period to a priest or clergyman marrying himself to a woman.

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So in the decided cases, when the clergyman is mentioned, a third person seems to be uniformly intended, as in *Holder v. Dillenson* (a), in an action for breach of promise of marriage, it is admitted and acquiesced in that the presence of the priest as a third party was requisite. It is true that it does not appear in that case that the contracting party was a clergyman. It appears that in very old times the priest met the parties at the door of the church. In *Bruce v. Burke* (b), the proof was of a marriage by a clergyman, who was a third person. In *Hawke v. Corri* (c), Sir W. Scott says that he would not consider invalid a marriage by a person who was considered and believed to be a clergyman; but he intimates that the marriage would not be valid if the license appeared to be forged, or the officiating minister a mere pretender to holy orders. He says:—"It is a generally accredited opinion that if a marriage be had by the ministration of a person in the church, who is ostensibly in holy orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties who come to be married (*i. e.*, who come to the minister) are not to be expected to ask for a sight of the minister's letters of orders, and, if they saw them, could not be expected to inquire into their authenticity." Sir W. Scott here assumes and supposes that the clergyman is a stranger, and not one of the parties. Would the principle thus laid down by him apply if the pretended clergyman were the husband? Would or would not the invalidity of his title to holy orders vitiate the marriage? In *Herbert v. Herbert* (d), the marriage in Sicily which was held good was celebrated by a priest, a third person. The marriages which Sir John Nicholl speaks, in *Stedman v. Powell*, are, as in all the other cases, marriages celebrated by a clergyman, distinct from

(a) 1 Freem. 95.

(b) 2 Add. 471.

(c) 2 Hag. Con. Rep. 283.

(d) 2 Hag. Con. Rep. 274.

the parties. In *Dalrymple v. Dalrymple*, in p. 98, Sir W. Scott says—"I might also refer to the marriages at Gretna Green, where the blacksmith supplied the place of the priest or magistrate." It appears from a note of Lord Justice Clerk M'Queen, to which Sir W. Scott refers, that it is the opinion of that Judge "that a private consent is not the *consensus* which the law looks to; but that it must be before a priest, or something equivalent, and that the parties must take the oath of God to each other." After adverting to Scotland, Sir W. Scott says:—"In all other countries a solemn marriage *in facie ecclesiae facit fidem*, the parties are concluded to mean seriously, and deliberately and intentionally, what they have avowed in the presence of God and man, under all the sanction of religion and law." I take this to mean not the sanction of a man to his own marriage, even though that man be a clergyman, but that of the church, represented by its distinct and separate minister.

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Let us now see whether some little light is not afforded us by legal enactments in England and Ireland. The 2 & 3 *Edw.* 6, c. 21, enabled clergymen to marry, but provided that they should not be at liberty to marry without asking in the church, or without the ceremony appointed by the order prescribed in the Book of Common Prayer. This was re-enacted in 5 & 6 *Edw.* 6, c. 12. Up to that time the contracting party must have been a layman, and consequently the clergyman must have been a third person. Was the effect of this Act to enable a clergyman to marry himself? Was it not rather to place the newly-qualified candidate for matrimony on the same footing as a layman, viz., that a person in holy orders might lawfully unite a spiritual as well as a lay person to a wife? The 10 *Anne*, c. 19 (*Eng.*), s. 176, imposed a penalty on any person in holy orders marrying any person without banns or license. The word "marrying" here signifies solemnising a marriage between two other persons, not contracting a marriage with any other person. Would a clergyman marrying himself to a woman incur this penalty? I apprehend not. The English Marriage Act, 26 *G.* 3, c. 33, s. 15, enacts that marriages shall be solemnised in the presence of two or more credible witnesses, besides the minister who



H. T. 1857. shall celebrate the same. This shows that the minister was the  
*Exch. Cham.* third party, capable of being a witness. There is no reason to  
 BEAMISH suppose that this was a new law, then for the first time introduced.  
 v. BEAMISH. anything more than the old view theretofore taken of the nature  
 the priest's intervention. The Irish Act, 21 & 22 G. 3, c. 3, does  
 recognises the validity of marriages between Protestant dissenters  
 and solemnised or celebrated by Protestant dissenting ministers  
 if the same had been solemnised by a clergyman of the Church  
 of Ireland as by law established. I entertain no doubt that these  
 marriages, and the only marriages, here intended to be invalid,  
 were those celebrated, according to general usage, by a third  
 person. The 58 G. 3, c. 84, validates marriages celebrated in England  
 of members of the Church of Scotland, solemnised by ordained  
 ministers of the Church of Scotland, as if solemnised by clergy  
 of the Church of England, according to the rules of that church,  
 and it then directs that the minister by whom such marriages  
 be solemnised shall sign a certificate, and such certificate shall  
 be signed by the parties *entering into such marriage*, and by  
 witnesses, and shall deliver a duplicate of such certificate to the  
 persons married, or to one of them. Now I ask whether, under  
 statute, Mr. Beamish's marriage would be good? Could it be  
 testified by the minister, and also by the parties? or could  
 Beamish deliver the certificate to himself? or, would the words  
 "according to the rules of that church," apply? In the time of the  
 Commonwealth an ordinance was passed, making void any marriage  
 other than before a Justice of the Peace; this was afterwards  
 repealed, and the validity of a marriage before a clergyman restored.  
 It is clear that in each of these instances a third person was  
 contemplated. The 57 G. 3, c. 51, enacts that marriages in New  
 England shall be celebrated by persons in holy orders, and that marriages  
 not so celebrated shall be null and void; and it contains a proviso  
 that nothing in the Act shall extend to marriages had under  
 circumstances of peculiar and extreme difficulty in procuring  
 a person in holy orders to perform the celebration. This appears  
 to furnish a very strong inference that the clergyman was not to be  
 one of the parties. Suppose no difficulty in procuring a clergyman

cisted, would the marriage be good, because the husband happened to be one? I should say not. This Act was repealed by 5 G. 4, 68, which enacts that marriages in Newfoundland shall be celebrated by persons in holy orders, except in certain cases specially provided for, in which latter case they may be celebrated by a person licensed for that purpose by the Governor. The 62nd Canon equires that a marriage by license shall be celebrated between eight and twelve o'clock, and in time of Divine Service. *Gibson Codex*, p. 465) speaks of dispensation from this canon granted to the minister and the two parties—evidently distinguishing one from the other. The Irish Marriage Act, 7 & 8 Vic., c. 81, directs the Rubric to be thereafter observed by clergymen solemnising marriages; and I think it is to be inferred from the provisions of that Act, that the person solemnising and the person to be married are different persons. *Jacob* (b), referring to clandestine marriages in England before the English Marriage Act, speaks of procuring the ministrations of a clergyman, and resorting to what were known as 'marriage shops;' and he refers to *Gothped's Annotations*, in which it is laid down: "*Non est matrimonium cui sacrorum benedictio deficit*" (c). *Scobell's Ordinances*, p. 86, contains an ordinance that marriage be solemnised by a lawful minister of the Word, that he may accordingly counsel them, and pray for a blessing upon them; and in p. 87 it is ordained that the intention to marry shall be published by the minister three Sabbath days; and of this publication the minister who is to join them in marriage shall have sufficient testimony before he proceeds to solemnise the marriage. From all this the clear inference is, that the minister was considered as a third party. *Blackstone* (cited 10 *Cl. & Fin.* pp. 897, 8) states that it is essential to a marriage that it be performed by a person in holy orders, though the rule for the intervention of a priest to solemnise the contract is "*positivi juris*."

I shall now advert to some passages in the works of eminent text-writers. *Dr. Comber's Treatise upon the Occasional Offices of the Church*, published A. D. 1679, appears to be a work of great

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(a) Burn. Eccl. Law, 466.

(b) 3 Bop. H. & W. 384, n.

(c) *Ibid*, 394.

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ability and erudition, and is, I believe, considered high authority upon ecclesiastical questions. In that part of his book which treats of the office of matrimony, he explains the Rubric relating to the nature and object of the priest's intervention. It is not unimportant with reference to the early views of the church upon this subject to cite some passages from this treatise. In p. 4, the author quotes from *St. Ignatius*, A. D. 120:—"It is fit that the bridegroom and bride be joined by the bishop's concurrence, that the marriage may be according to the Lord." He also refers to the *African Council*, A. D. 398:—"That the parents and paranymphs should bring the man and his spouse to be blessed by the priest, before they are together; nor was it esteemed a lawful marriage without the priest's blessing." And again he quotes *Pondonius' Life of St. Augustine*, which mentions the constitution of Augustine, "That when the marriage was agreed upon, the priest was to be called to confirm their compact should be confirmed, and their persons blessed." In p. 23 he says:—"The congregation are to be witnesses to the marriage covenant." Again, in p. 63, speaking of parents' consent, he refers to the Council of Carthage, which appointed, "that the parents shall offer them to the priest for to be given in marriage," and in p. 84, commenting on the priest's putting their hands together, he considers the priest as God's representative, sanctioning the union. In p. 86, he gives one reason for the presence of the priest, viz., that although originally the espousals and the marriage were distinct things, the former being only the promise of a future marriage, yet it was thought convenient that espousals should not be left to be made in private, as a mere civil compact, "whereas it was ordered that these contracts should be made in the presence of a priest." In p. 88 he cites an old canon prohibiting contracts "per verba de presenti, nisi coram sacerdote." In p. 119 the author thus expresses himself:—"The priest is God's representative, and may justly now set his Lord's seal thereunto, which he doth in three particulars; first, by a declaration of the authority by which the covenant hath been made; second, by the publication of its validity; third, by a benediction pronounced upon those who have made the same;" and in p. 122, he calls the priest "the ambassador of God." This is quite in accordance with

the other authorities to which I have referred, as showing that publicity and attestation were amongst the objects which the church had in view in requiring the presence and intervention of one of her ministers. We must take the law to be as stated by Chief Justice Tindal, namely, that there must be a religious ceremony according to the law of the church; that law he considers to have varied from time to time, and to be evidenced by usage. Is there a trace of an usage that the intended husband, if a clergyman, may marry the intended wife, by himself performing the ceremony, as well the solemnising as the contracting portion of it? None whatever; no exception is anywhere introduced to meet such a contingency. We nowhere find the general rule qualified by any reference to the case of the priest and the husband being the same person; there is not the remotest allusion to such a case. Can this be reasonably accounted for, otherwise than by the supposition that it was considered impossible? It is therefore a novelty, an innovation, having no sanction from precedent or from any authority.

It is urged that if a clergyman marry himself to a woman, using the proper religious rite, the marriage is performed by a clergyman, and therefore not in the absence of a clergyman. But is this what the Common Law of England meant when it required a marriage to be solemnised by a priest? Is this what the church understands by directing that the contract between the parties shall be rendered solemn, by the superadding of the sacred sanction of religion, to be given through the medium of one of its ordained representatives? Is this the law of England, as evidenced by "usage," in the language of Chief Justice Tindal? Would he have said that usage would establish such a law? To hold it so would be to defeat all the purposes which the law had in view. These objects were, first, to prevent improvident and improper marriages; next, to give publicity to marriages; and lastly, to give to this most important and peculiar contract the highest of all sanctions, by requiring it to be registered in the sight of Heaven, in the presence of one of God's ministers. Can it be said to be a compliance with a rule established for those purposes, that a man who happens to be himself a clergyman shall go through the form prescribed by the church, or so much

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of it as he can by variation adapt to the occasion, no person be present but the woman? I should say not. I should say that even if a formal or literal, is not a substantial, compliance with law; that it is in effect an evasion under the guise of observance and that unless the language of some respectable writer, some decision, or, at least, some *dictum*, can be produced, affirming that a marriage is that which the Common Law, based upon the Ecclesiastical Law, sanctions, it is not for this Court to establish precedent, of which the effects may be mischievous to an extent which it is not easy to foresee.

I have now to advert to the form of solemnising matrimony prescribed by the Rubric, and which, as I understand it, strongly negatives the notion that such a marriage as this is conformable either to its letter or its spirit. It is scarcely possible, in my opinion, to read any passage from the Book of Common Prayer containing this ritual, without coming to the conclusion that it is framed to meet the case, and the case only, where a clergyman is to marry two other persons. I do not suppose that the whole service was in this case gone through exactly as printed in the prayer book; indeed that would be impossible, without something like profane mockery. We are not to suppose that Mr. Beamish dressed Isabella Frazer (they being the only two persons present) in the language:—"Dearly beloved, we are here gathered together in the sight of God and this congregation, to join together this man and this woman in holy matrimony." What is the meaning of "we are gathered together to join?" We (the church, the congregation) have met that we may join them, *i. e.*, that the church represented by us, may unite them. Neither, I presume, did Samuel Swayne Beamish use these words:—"I require and charge you both, as you will answer at the dreadful day, when the secrets of all hearts shall be disclosed, that if either of you know of any impediment why ye may not be lawfully joined in holy matrimony, ye do now confess it." Such a charge addressed by the clergyman to himself would be unmeaning; indeed, I should go further, and say it would be an unseemly mockery of what was intended to be a solemn admonition and inquiry—one in its very nature implying

that the person who puts it is a stranger to the thoughts and feelings of those to whom it is addressed. Nor, again, are we to suppose that Mr. Beamish asked himself, "Wilt thou have this woman," &c., or to Isabella Frazer, "Wilt thou have this man (pointing to himself) to thy wedded husband?" If not, then Mr. Beamish must have commenced with that part of the form, "I take thee, &c., to my wedded wife," &c. The form, however, prescribes that the man shall say those words after the minister; and so as to the woman. This was impossible in the present instance, so far as related to the man; so when the man puts the ring on the woman's finger, the Rubric is that, "taught by the priest," he shall say, "with this ring I thee wed," &c. The verdict finds that Mr. Beamish pronounced the blessing in said form appointed. I do not conceive that this means the benediction which immediately follows the putting on the ring; for, although it has been argued for the defendant that what is called the benediction is only a prayer to the Almighty, which any person might make, and which, therefore, there is no absurdity in supposing Mr. Beamish to have offered up for himself; yet an examination of the form of benediction will show that it is not a supplication to God to send His benediction, but that it is the benediction of the church, conferred and granted by the minister as the agent or representative of the church, and of the Almighty. The words are, "O Eternal God, &c., send thy blessing upon these thy servants, this man and this woman, whom we bless in thy name." The declaration of the minister pronouncing them man and wife next follows; that, like the other parts, is inapplicable to a person addressing himself and another person only. The other prayers and exhortations which fill up the rest of the ceremony, and the directions of the Rubric, are clearly inapplicable to such a case as the present. Thus it is prescribed, "that after the blessing, the minister or clerk, going to the Lord's table, shall say or sing certain psalms; and the psalms ended, and the man and the woman kneeling before the Lord's table, the priest standing at the table, and turning his face towards them, he shall say," &c. But it is said the whole form need not be used; it is enough to read or go through the substantial part; that is, in such a case as the present, the

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giving and the receiving the plighted faith, &c. If so, and we confine ourselves to so much of the prescribed form, we have more than the mere contract *per verba de presenti*, and for anything appearing in it of religious rite or solemn confirmation in the face of Heaven, or sanction from on high, it might just as well be decided to be a valid marriage as being a mere civil engagement. I am at a loss to conceive how such a proceeding can be held to give the contract a religious character, or impress it with a divine sanction, at all events, such a character and such a sanction. In the early history of the church it was contended that the ceremony should confer, or it was supposed that it did confer.

In the judgment of the Court below, it is said that the marriage ceremony, according to the form prescribed in the Book of Common Prayer (as nearly as under the circumstances it could be) was performed by a clergyman of the Established Church. The learned Judge who pronounced the judgment seems to have thought it sufficient that the ceremony should be performed *quam proxime de jure pres.*, and that as there was a clergyman, it was enough to adhere to so much of the form as the peculiarity of his situation rendered it possible for him to observe. With the greatest possible respect, I should rather conclude that the clergyman is not to marry himself, because he cannot do so without deviating from the form, than hold that the form is to be departed from, because the person to be married is a clergyman. In the judgment below it is conceded that there must be the presence and intervention of a priest or orders. Now, what is presence? and what is intervention? Intervention is defined to be agency—acting between two people. What is the meaning of “an intervenient” in the Ecclesiastical Law? A third party, who interposes or comes in in addition to the original litigant parties; and we are here dealing with a question connected with the Queen’s Ecclesiastical Law: but indeed, on obvious grounds of general construction, I should say the conclusion must be the same. Suppose an Act of Parliament required that a will should be executed in the presence of a clergyman, would it be sufficient that the testator was a clergyman, no clergyman being himself being present? or if a settlement required a power to be

executed in the presence of a clergyman, might the donor of the power, if a clergyman, make a valid appointment, no other being present? I am at a loss to understand a man's being present with himself, or doing a thing in his own presence.

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*Whately*, in his book *on the Common Prayer*, speaking on the ceremony of marriage (p. 403), says that the witnesses to the vow are, God; the angels, the minister and the congregation. It appears, from the same author, that even espousals were ordered originally to be made in presence of a minister; and in p. 405, referring to the form, "who gives this woman to be married?" he says:—"The minister is to receive her (*i.e.*, from the person giving), that he (that is, the minister) may give her in marriage, and that he (the minister) accordingly delivers her to the husband." The whole of this view of the ceremony is irreconcilable with the notion that the minister is himself to be the husband. In *Palmer's Origines Liturgicæ* (2 vols., p. 209, ed. 1832), extracts are given from the ancient manuals of Salisbury and York, as illustrative of the form of matrimony contained in the Rubric. From the language of these manuals, it is evident that in early times the intervention of the priest was that of a third party. Thus, with reference to the preliminary part of the Rubric, viz., "at the day and time appointed the persons to be married shall come into the church," &c., the words of the manual are:—"Statuantur vir et mulier ante ostium ecclesiæ, coram Deo et sacerdote et populo, vir a dextris mulieris et mulier a sinistris viri: tunc interroget sacerdos, banna dicens in materna lingua sub hac forma." This is inconsistent with the notion of the bridegroom being the officiating party. So, again:—"Postea dicat ad virum, cunctis audientibus, in lingua materna, vir habere hanc mulierem, &c. Item sacerdos ad mulierem hoc modo." And again, referring to the intended husband:—"Det fidem mulieri *docente sacerdote*;" and "dicat sacerdos benedictionem *super eos*;" and "tunc prostratis sponso et sponsa ante gradum altaris, roget sacerdos circumstantes orare pro eis."

The test proposed in the judgment below is, I agree, the proper one, viz., whether the two requisites concur, of a contract *per verba de presenti*, and the solemnisation of a religious ceremony through



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the intervention of a clergyman. But it appears to me that the latter is irrelevant, as I understand it, is wanting in the law. I think that in truth and substance there has been no such an ordained minister as was meant and intended in *v. Millis*. It is admitted by the Court below that it must be done in the language of the ceremonial in the Common Prayer, in order to make it valid in the ceremony has here taken place. But why is this violence to be done? Is it necessary for it? Where the policy which requires the judgment below admits that such a case as the present was never contemplated by those who framed the rule. I would rather, and say it is manifest that it never was. And why not? Because no usage had sanctioned it, nor had any of it been known. I cannot think that the answers to the questions given in the judgment below are at all satisfactory. I said that though the minister may be a witness, yet that is not his primary or proper duty. But the question is not whether that is his primary duty, or whether any other person might not as well be a witness; the real question is whether, amongst the reasons which originally gave rise to the rule requiring his presence, this was one, viz., that he might be a witness? It is impossible, I think, upon reading the authorities, to doubt that it was not only a reason but a main and important reason. Again, it is no sufficient answer to say that it has never been held that a departure from the form, if not a substantial one, will invalidate a marriage otherwise good. Unquestionably it has never been so held—any the contrary is settled; but then the person officiating in these instances has uniformly been a third person; and it is, perhaps, because he is a third person that the marriage is not invalidated on the principle that the contracting parties ought not to suffer from the omission or default of another. The departure from the form is not relied upon to show a marriage otherwise good to be bad; but the impossibility of adapting the form to the case in hand is an argument that the marriage has not been solemnized by the proper person. The objection to the present marriage is not that the proper minister has deviated from the form; but

the form is resorted to in order to show that the person who officiated in this instance was not the proper minister.

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As to any supposed analogy between a clergyman marrying himself, and administering the Sacrament of the Lord's Supper himself, I am at a loss to discern its existence. The Rubric expressly directs that the minister shall himself receive the Communion in both kinds before he administers to the congregation. The case is expressly provided for; and, of course, any variation necessary for his so doing would be allowable and consistent with the rest of the service; but, in truth, there is no variation in the case of the Lord's Supper, for no form is prescribed for the minister when he eats the bread or drinks the cup. The form is directed to be used only when he delivers the elements to the other communicants. Another argument relied on in the judgment is, that baptism by a layman is good, although the Rubric requires it to be by a minister; but if that argument be good for anything, it would go to show that no minister at all is necessary to a marriage, whereas we are arguing on the assumption that to a marriage some minister is essential; and the only question is, what minister? It is not, of course, conceived that because baptism by a layman is recognised, therefore a marriage by a layman is good; yet if the analogy be worth anything it would prove that proposition.

I entirely concur with the learned Judges below, in saying that it would be deplorable and disastrous to the peace of families, if parties *bona fide* intending to be married were liable to have their marriages invalidated by a deviation, on the part of the clergyman who married them, from the established rubrical forms. But the present case is not that, nor anything like it; and if we are to allow considerations of the peace and happiness of families to influence us, it may be said that it would tend more to promote both to say that marriages must be solemnised by a clergyman, who is a third party, than to encourage the not very decorous or laudable practice that a clergyman (part of whose duty is to exhort and guide the betrothed couple by his advice at their marriage) shall clandestinely be his own minister, and unite in himself two functions, which it is expedient at all events to keep distinct, and which

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there is no authority or precedent for confounding. It may be very proper that two parties, innocently believing that a person marrying them was in holy orders, and had regularly discharged his duty, should not suffer from his neglect or misconduct, and it could not follow that a marriage celebrated in an unusual manner between two parties, each knowing the situation of the other, at all events, each knowing his own, should be good.

*Ayliffe's Parergon* (304) has been cited as an authority in support of the marriage. I do not consider it so; it merely states that clandestine marriages may be good; but the meaning of clandestine here is not, in my opinion, marriages without the presence of a third party as a clergyman, but marriages not celebrated *in facie ecclesiæ*. Indeed the form of the passage in *Ayliffe* shows that it is an authority rather against than in favour of such a marriage as this, for he speaks of the parties receiving the benediction of the priest.

As to *Maxwell v. Maxwell* (a), in which Dr. Radcliffe decides that secrecy or irregularity will not vitiate a marriage in Ireland, it is no authority to show there may be a good marriage without a priest, or when the husband may himself solemnise the marriage. Indeed, the contrary may, I think, have been the opinion of this very learned Judge, for he says that the priest or the parties might be canonically censured. I do not consider that Dr. Radcliffe has the most remote idea of sanctioning such a marriage as the present. In the case of *Lantour v. Teesdale* (a), as in every other case cited, the officiating clergyman was a third party. In all these the marriage was held, as this was below, irregular but not void; and the objection here were as in those instances, clandestinity merely, or the omission of a non-essential part of the ritual, or a celebration in a private house, or at uncanonical hours, or such like, I fully agree that the marriage would be only irregular, but not void. But, according to my view of the law, an essential and vital ingredient is wanting, and without it the marriage seems to me to be altogether invalid.

The question involved in this case is of the utmost importance.

(a) *Millw.* 291.

(b) 8 *Taunt.* 830.

as it appears to me, with reference to future as well as to past marriages; for I do not find anything in the late marriage Act (7 & 8 Vic., c. 81) to prevent its being hereafter raised under similar circumstances. If Mr. Beamish's marriage was good, I see nothing in that statute to invalidate any future marriage of the same description (see ss. 1 & 2). No witness is required by that Act, unless where the marriage is celebrated in a registered building, under section 29. I have no doubt that the clergyman officiating under the first section was considered to be, and contemplated as, a third party (*vide* section 26).

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Finding myself thus called upon to join in making a new precedent to sanction an innovation for which I find no warrant in any decision or even *dictum*—to say that the law has been in substance and in spirit observed, to concur in a judgment recognising the legality of a marriage of a clergyman by himself, in violation of all the analogies supplied by previous authority, in subversion of the policy which seems to me to have dictated the requirements of the law, in evasion and frustration of the purposes which it was designed to answer, in opposition to every inference which is to be drawn from the language of the eminent Judges and writers to whom I have referred, in contravention of what appears to have been from the earliest times the usage of the Church and the Law, I find myself unable to express my concurrence in the judgment of the Court of Queen's Bench. I, therefore, though with unfeigned diffidence, arising from that judgment, as well as from the difficulty and obscurity of the subject itself, must express my opinion to be, free from any other doubt than such as those circumstances must necessarily create, that the judgment of the Court of Queen's Bench ought to be reversed.

MOORE, J.

After a careful attention and examination of the principles on which the judgment was founded, and also after an attentive examination of the case of *Regina v. Millis*, I still think that the judgment given in the Court below, on this novel but important case, should be affirmed. The starting point is the case of *Regina*

H. T. 1857. *v. Millis*. I think I am bound by that case, and bound by  
*Esch Cham.* very point on which it was decided. For, considering what  
 BEAMISH the truth, that the decision in that case was the result of  
 v. application of a technical rule of the House of Lords, and without  
 BEAMISH venturing to differ from the able men who gave judgment in  
 case, in my opinion the judgments of Lords Brongham, Cairns,  
 and Denman are the best founded. I am not bound to carry  
 case one jot beyond what it goes, nor deduce any consequence  
 except that which inevitably flows from it. That case decides  
 the presence and intervention of a priest in holy orders is necessary  
 to render a marriage valid; that such has been the principle of  
 Common Law I admit, and I am bound to uphold that to its full  
 extent. In this case there has been a presence and intervention  
 of a clergyman in holy orders, but such clergyman was one of the  
 contracting parties, and the question is, whether such is sufficient.  
 Two reasons have been assigned for the adoption of the argument  
 against its sufficiency:—first, that to every marriage the clergyman  
 should be present as a witness; and secondly, in order that the religious  
 ceremony should be superadded to the civil contract. The first of these  
 the first be a true one, namely, that it is necessary that the clergyman  
 should be a witness, it is conclusive, for if it be necessary at  
 Common Law that he should be a witness, the marriage contracted  
 himself by a clergyman would be of no avail. I reject the first  
 proposition, for I cannot think that the Common Law would require  
 every marriage, no matter how many respectable persons may be  
 present, unless a clergyman were present. The second proposition  
 is the true one; and adopting the decision in *Regina v. Millis*, I  
 consider that the Common Law would take cognizance of the civil  
 contract and the religious ceremony. It is found on this special  
 verdict, that the form for the solemnisation of marriage, as given in  
 the Book of Common Prayer, was read by the Rev. Samuel  
 Beamish; that he took her as his wife; that she took him as her  
 husband; that he placed a ring on her finger, and pronounced the  
 blessing in the appointed form. It is true that the form given  
 in the Book of Common Prayer did not contemplate that a clergyman  
 should be one of the contracting parties. I concur with the

rothers KROGH and GREENE in that, and also, that when the clergyman is one of the contracting parties, he must deviate from the form given in the Book of Common Prayer; but it appears to me that whether it be performed by a clergyman for himself, or by a clergyman as a third party, it is substantially a complete religious ceremony; and that the party would be as fully imposed with the religious character of that ceremony, when performed by himself, as if he had been married by a third party. He may have been guilty of impropriety, and, perhaps, of blasphemy, as stated by my Brother KROGH, but still it appears to me a sufficient ceremony. In *Regina v. Millis*, the religious ceremony was declared necessary, but it does not decide that the marriage would be void if the clergyman was one of the contracting parties; and unless there be an express decision to that effect, I will not concur in bastardizing the issue of such marriage, or in defaming the character of those who believed in the efficacy of such a union.

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JACKSON, J.

This is a writ of error, brought to reverse a judgment of the Court of Queen's Bench, by which it was decided that a clergyman of the Established Church had celebrated a valid, legal marriage between himself and a female member of the same communion. The Judges of that Court held themselves bound by the case of *Regina v. Millis*, which, as they considered, had conclusively settled the law applicable to this case; though, at the same time, if I collect rightly, they thought the law required to be amended by the Legislature. I have carefully considered that case of *Regina v. Millis*, and though I agree with the Court of Queen's Bench, that it must be regarded as a binding authority, being, according to the course and practice of the House of Lords, to be deemed the decision of that High Court, yet I am of opinion that it by no means governs the case now before us.

Amongst the reasons given by the Queen's Bench, in their judgment, I find it stated that *Regina v. Millis* decided *negatively* that a contract of marriage *per verba de presenti*, however solemn the engagement, and though followed by consummation, is not to be

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*Exch. Cham.* affirmatively, that where these two concur, a contract of marriage  
 BEAMISH *per verba de presenti*, and the intervention of a minister in epi-  
 v. copal orders, the marriage is a valid marriage. By the word "in-  
 BEAMISH. tervention" here, I understand the Court to mean that the ceremony  
 has been performed by a minister in holy orders. No doubt, the  
 case does decide negatively that a contract of marriage, *per ver-  
 ba de presenti*, without the intervention of a minister in episcopal  
 orders, is not valid. But, in my opinion, it does not decide affir-  
 matively the latter proposition—namely, that in all cases where the  
 two requisites concur, the marriage is valid; and with all deference  
 to the Court of Queen's Bench, it would appear to me that the  
 opinion of *Regina v. Millis* has led to an erroneous judgment in the  
 case.

It is not my intention to go through the authorities in detail  
 which, in my opinion, establish the law as it is settled in *Regina v. Millis*.  
 The validity of the marriage in this case must  
 be determined according to the validity of the Marriage Law  
 of England as it stood prior to the 26 G. 2, c. 33 (*Eng.*), for the  
 marriage took place in Ireland prior to the passing of 7 & 8 V.  
 c. 81. It is not by the general Canon Law of Europe, or by the  
 Civil Law, that marriage was regulated in England prior to the  
 26 G. 2; but by what has been denominated the King's Ecclesi-  
 astical Law, which has the General Canon Law for its basis, to  
 which has been modified and altered from time to time by the  
 ecclesiastical constitutions of archbishops and bishops, and by the  
 Legislature also. This Law required the performance of a religious  
 ceremony; but the ceremony appears to have been varied from  
 time to time according to the laws of the church; and whatever has  
 been held sufficient by the law of the church at any given period  
 appears to have satisfied the requirements of the King's Ecclesi-  
 astical Law. According to the opinion of the Judges in England  
 delivered by Tindal, C. J., in the House of Lords, in the case of  
*Regina v. Millis*, a contract of marriage, *per verba de presenti*,  
 was a contract of which performance might be compelled by the  
 Spiritual Court; but it was not a marriage unless made in the

presence and with the intervention of a minister in holy orders; and Tindal, C. J., further stated, quoting the opinion of Lord Holt, that the marriage ought to be celebrated according to the rites of the Church of England, in order to entitle to the privileges of legal marriage, as dower, thirds, &c.; and I find Lord Cottenham quoting the same authority for the same position.

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I ask, what was the obvious policy of the law, and what was the object contemplated in so requiring?—Was it not, plainly, to insure publicity and solemnity in respect of these contracts, affecting (as they do) not merely the individuals immediately concerned, but the community at large? It is most important that marriages should be capable of proof. This has been felt at all times, and was required by the General Marriage Law of Europe, as well as by the Marriage Law of England. By the Canon Law a marriage was not good though contracted *per verba de presenti*, unless witnesses were present. By the King's Ecclesiastical Law, the presence of a priest was deemed equivalent to a witness or witnesses; and even the Law of Scotland (the least strict of any) requires the presence of two witnesses, or at least of one witness, with corroborating circumstances, or writing, to prove the marriage, in order to give it validity. This I collect from the evidence given in *Dalrymple v Dalrymple* and *Butler v. Lord Mountgarret (a)*. I would also observe that our late Marriage Act (7 & 8 Vic., c. 81) shows the view which the Legislature takes of this subject. It contemplates the person celebrating the marriage as distinct from the parties to the contract; and it expressly requires the presence of two witnesses to the marriage. And it was admitted by Lord Brougham—one of the dissenting Lords in *Regina v. Millis*—that for dower the law did require solemnity and publicity; and a very early writer, of high authority (*Lyndwoode Prov.*, b. 4, p. 27), states that solemnity, publicity and attestation, were necessary to the validity of marriages. There appears no good reason why publicity and attestation should be required only with a view to dower, thirds, &c.; so many other valuable civil rights depending upon marriage, the power of proving the fact of the marriage in all cases would appear to be

(a) 6 Ir. Law Rep. 77.



H. T. 1857. *Essentially necessary.* Lord Campbell also considered that according to the Canon Law, the presence of a priest was required though only as a witness. I think the cases and the authorities cited in the argument show that solemnity and publicity are requisite to establish heirship, as well as a right to dower; and it would appear to be very inconsistent if the law should require them to establish dower—a charge on the land—and not to establish a right to the inheritance of the land itself; and accordingly the law says—“*Hæres legitimus est quem nuptiæ demonstrant*.”

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With reference to the doctrine propounded by the Judge in *Regina v. Millis*, and adopted by the judgment of the Lords, namely, that a marriage contract did not constitute a legal marriage unless made in the *presence and* with the *intervention* of a minister in holy orders, I would draw attention to the words *in the presence and* with the *intervention* of a minister, and I would observe that this language manifestly imports that the mere presence of a minister (as in this instance being himself the bridegroom) is not sufficient; there must be the intervention of a minister between the parties to the marriage; and this will be found in perfect accordance with the view of this matter taken by the church, as indicated by the solemn service appointed by the church for the celebration of marriage; and this I shall have occasion to refer to more particularly hereafter.

I have said that, in my judgment, *Regina v. Millis* cannot establish the validity of the marriage in the case now before us. In the first place, the House of Lords was not called upon to decide upon the question we have to determine; and in the second place, the very peculiar circumstances which characterise the present case did not exist there, nor did any learned Lord, in delivering his judgment, contemplate, or at least advert to, such a state of facts as is presented to us in this special verdict. In that case the officiating minister was not himself one of the parties entering into the marriage contract, as here, nor was the ceremony performed in secret, as here. On the contrary, the special verdict there found that the marriage was performed by the Presbyterian minister in the presence of three witnesses, and according to the usual form of

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into between two persons, *per verba de presenti*, must it not, to have any meaning, be understood to refer to a contract entered into between two *other* persons, and not between such *other* person and the clergyman who is required to be present on the occasion? Again, can a man be said to intervene at the making of a contract between himself and another person?—or in other words, do not the terms “presence and intervention,” at the making of the contract, plainly import that the clergyman is not to be himself one of the two contracting parties, but is to be present at the contract of *others*, and to intervene therein?

There appears thus to be a great difficulty in holding that the legal requisite of the presence and intervention of a minister in orders was satisfied by what occurred in this case; and, in my judgment, it was not.

But apart from the meaning to be given to the terms “presence and intervention,” it is insisted that *Regina v. Millis* is itself a direct authority for the validity of the marriage in this case; and the argument, as I understand it, proceeded thus:—*Regina v. Millis* has decided *negatively* that a contract of marriage *per verba de presenti* does not constitute a valid marriage, unless entered into in the presence and with the intervention of a clergyman; and thereby it must be understood to have decided *affirmatively* that where the two requisites concur, viz., a contract of marriage *per verba de presenti*, and the presence and intervention of a clergyman thereat, a valid marriage is the result. It was then argued that, as we find here, *ex concessis*, a contract of marriage *per verba de presenti*, and likewise the presence of a clergyman, together with (as is contended) his intervention, by celebrating the marriage ceremony according to the form in the Book of Common Prayer, the concurrence of the two conditions necessary to constitute a valid marriage, according to the decision in *Regina v. Millis*, is thus shown, and thereby the validity of the marriage in this case is established. But I cannot acquiesce in the position that *Regina v. Millis*, in deciding *negatively* that a contract of marriage *per verba de presenti* does not constitute a valid marriage, unless entered into in the presence and with the intervention of a clergyman, has thereby.

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H. T. 1857. established affirmatively that, where these two conditions <sup>are</sup>  
*Esch. Cham.* a valid marriage is necessarily the result. That decision proceeded  
 BEAMISH upon the state of facts then before the Court, and not upon  
 v. which had no existence in the case, and which cannot be  
 BEAMISH. conjectured to have entered into the contemplation of the tribe  
 which decided it. In that case, no objection existed to the validity  
 of the marriage, except the absence of a clergyman in order:  
 every other respect the marriage was unimpeachable. Then  
 can it be inferred that, because in the case of a marriage otherwise  
 unobjectionable, the presence and intervention of a clergyman  
 orders would have given it validity, the same result would be  
 taken place if the marriage had been open to objection on other  
 grounds? Suppose, for instance, the parties had been by  
 incapable of contracting marriage together, could the presence  
 and intervention of a clergyman, upon the occasion of a contract  
 between them *per verba de presenti*, have rendered it a valid  
 marriage? or, suppose a clergyman to be by law incapable  
 celebrating a valid marriage between himself and a woman, with  
 the presence and intervention of another clergyman, of what use  
 could his own presence and intervention on the occasion be deemed  
 even if what occurred could be held to have amounted to intervention?

Then what is there to sustain the validity of this marriage?  
 cannot say that I have been able to discover any sufficient ground  
 for establishing it. On the other hand, what is there to impeach  
 its validity? There is the law, as settled in *Regina v. Mill*  
 requiring the presence and intervention of a minister in order, and  
 importing plainly, as I consider, by the use of those terms, that  
 such minister is to be a third person, and not himself a party to the  
 contract. Then there is the position warranted by reason, and sustained  
 by the authorities which have been cited for the purpose, that  
 the presence and intervention of a clergyman is required, not merely  
 as a celebrant of the religious rite, but likewise as a witness of the  
 due performance by the parties of the requisites to validate the marriage,  
 "*ut det testimonium ecclesiae*," as was said in one of the cases  
 referred to at the Bar; and that being so, one of the purposes

for which the presence of the clergyman is required by law, viz., that he should be a witness, is frustrated, if he be himself a party to the contract. Nor does it strike me to be an answer to this objection, that any layman who may be present at the ceremony is a competent witness to prove the marriage; for although that be so, the law may well have confided specially, as it were, to the clergyman, the duty of witnessing and superintending the marriage proceedings, trusting to his knowledge and experience in the matter, and to the conscientious obligation under which he must be supposed to believe himself to discharge faithfully the duty so imposed upon him.

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*Esch. Cham.*  
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But as against the validity of this marriage, the argument derived from its incompatibility with the forms and ceremonies prescribed by the Book of Common Prayer appears to me of peculiar weight; my Brethren who have preceded me have pointed out the portions of the ceremonial of marriage contained in that book which bear upon this part of the argument; and on perusing them, it appears to me manifest that the celebration of the marriage of a clergyman by himself never entered into the contemplation of the framers of the Book of Common Prayer, and accordingly they have provided no ceremonial for such a marriage. That being so, the statute which directs the clergyman to perform the ceremony of marriage, according to the forms in the Book of Common Prayer, must be understood as not contemplating, but on the contrary repudiating, the marriage of a clergyman by himself, for which no form is given by that book; and yet it is contended that a marriage for which no ceremonial exists, which is *without* the Book of Common Prayer, and *without* the statute whereby the clergy of the Established Church are regulated in the performance of the marriage ceremony, is yet recognised by law, and invested with all the attributes of a valid marriage.

It has been urged, however, that there is no legal objection to the clergyman altering the phraseology of the Rubric, so as to make it suit the performance of the ceremony of his own marriage by himself, provided he adheres to the substance of the directions given; and, as an illustration, it is relied on that, in administering the Communion to himself, the clergyman in practice



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departs from the phraseology prescribed by the Book of Common Prayer, to be used in the administration of the Communion to persons. I am not aware of this as a matter of fact; but as it to be so, it is to be observed, in the first place, that no *alteration* made thereby in the language of the Book of Common Prayer, for the simple reason that there are no words prescribed by it to be used by the clergyman in administering Communion to himself; but again, the words which are to be used in practice by the clergyman in administering Communion to himself (though they may not be in terms prescribed by the Rubric) are consonant to the act of his taking the Communion, which it directs; whereas, in the case of the clergyman performing the ceremony of his own marriage, an alteration in the language of the Rubric is adopted to suit a case on a subject of any direction contained therein, or at all contrary thereto thereby. But, in any event, the circumstance of a practice prevailing, properly or otherwise, for clergymen to make use of a certain form of words not required by the Book of Common Prayer in administering the Communion to themselves, can be pressed seriously as an argument for the right of a clergyman to depart from almost the entire tenor of the marriage ceremony contained in the Book of Common Prayer, in order to perform another ceremonial to suit the performance of the ceremony of his own marriage by himself.

It was urged at the Bar that, although the present was confessedly an irregular marriage, and one which would subject the clergyman who celebrated it to severe ecclesiastical censure, it would not on that account be deemed a void marriage by the Spiritual Courts; and numerous instances were referred to those Courts, in condemning irregularities practised in relation to marriages, and punishing the parties guilty of them, but which refused to declare the marriages void: it was thence inferred, without any authority whatever being cited to sustain the inference, that the present was merely an irregular marriage, which the Ecclesiastical Court would censure, but would not declare void. The fact was then appealed to, of the Common Law having

all times adopted the law of the church on this subject, as set forth in the judgment of Tindal, C. J., in *Regina v. Millis*; and it was concluded that, under those circumstances, the present marriage was valid at Common Law. It was further argued that the *factum* of the marriage having been proved in this case, and the principle of law being to presume in favour of an actual marriage, the present marriage must be held valid, unless it can be shown that such marriages have been held void by the law of the church.

Now, as to the position that this was a mere irregular marriage, and not void in the Ecclesiastical Courts, it may be sufficient to observe that it is quite gratuitous, as having no authority whatever to sustain it. Of course, it cannot be meant to contend that the Ecclesiastical Courts will sustain all marriages *de facto* as valid, no matter under what circumstances they may have been contracted; and yet, unless this be so, what warrant is there for the argument that because the Ecclesiastical Courts have, in certain instances, refused to hold void marriages which have been irregularly celebrated, they will therefore in this instance hold the marriage valid, a marriage contracted under circumstances perhaps without parallel in the history of Christendom? Then, as to the position that those who impugn the validity of this marriage are bound, upon the doctrine of presumption, to show affirmatively that the Spiritual Courts have held such marriages void; the answer appears to be that, supposing the rule of presumption in favour of an actual marriage to apply here, those who impugn its validity in this instance are not to be confined to one mode only of showing it to be invalid, viz., by adducing instances wherein the church has condemned such marriages as void, when, upon other sufficient grounds, they can establish the point; but as to the absence of any decision in the Ecclesiastical Courts, or any direct authority in Ecclesiastical Law to that effect, it may be accounted for on the ground of such a marriage as the present having never been brought under the cognizance of the Ecclesiastical Courts, or contemplated by Ecclesiastical Law as likely to be ever attempted to be sustained.

Then it must be borne in mind that this was a marriage without a witness to prove its celebration. Now, the laxity of the Law

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H. T. 1857. of Scotland respecting marriages has been long felt and reprobat  
*Exch. Cham.* By that law, as it is stated to be collected from the report of  
*BEAMISH* case of *Dalrymple v. Dalrymple*, a contract of marriage *per ver*  
*v.* *de presenti* constitutes of itself a valid marriage, provided it  
*BEAMISH.* been entered into in the presence of at least one witness, but  
otherwise—I say at least one witness, for it should seem that eit  
a second witness, or some writing or state of circumstances tend  
to the proof of the fact is deemed also necessary to establish  
validity. But what have we here? a contract of marriage betw  
two persons, without the presence or intervention of a clergyman  
and amounting therefore to nothing more than a contract *per ver*  
*de presenti*, and without a single witness to attest the fact of  
having been entered into; a contract therefore which, under th  
laxest possible of all marriage codes, the Law of Scotland, wou  
not constitute a valid marriage; and yet this Court is called up  
to sanction, as legal and binding for all purposes, a marriage whi  
even the Law of Scotland repudiates and holds to be altogether  
void.

The case of *Holmes v. Holmes*, of which, be it observed, we ha  
no printed report, has been appealed to by both parties in this cas  
In my judgment (as well as I can collect its import from the statu  
ment at the Bar), it is no authority for either party.

Under all the circumstances, I think that this marriage is  
invalid, and therefore that the judgment of the Court below ought  
to be reversed.

RICHARDS, B.

I was not present when this case was first argued in this Court  
but I have heard a very able supplemental argument.

With respect to the point primarily contended for by the  
plaintiff, viz., that a marriage *per verba de presenti*, no clergyman  
being present, was a good marriage in law, though irregular, I am  
of opinion, regard being had to the ruling in *Regina v. Millis*,  
that we are not now at liberty to deal with that as an open question.  
I therefore must decline to express any opinion on that subject.  
The Law Lords, though equally divided, yet ultimately gave judg-

ment against the Crown in that case, and I take it that all inferior tribunals are bound by that ruling.

In considering the present case, I feel bound, therefore, to assume the law to be that the presence of a clergyman was, at the time when the ceremony of marriage in this case was performed, absolutely necessary to constitute a marriage valid in point of law: of course I am speaking of a period anterior in England to the English Marriage Act, and in Ireland to the 7 & 8 Vic., c. 81. In all ordinary and regular marriages, one can easily understand the object in having a clergyman present at so solemn and important a ceremony; but with respect to marriages of a different class, with respect to irregular marriages, I do not find the object for which the presence of a clergyman was considered necessary very clearly defined. It has been suggested in some of the authorities to which we have been referred, and it has been argued strongly by Counsel in this case, that the presence of the clergyman may have been required, I mean required in point of law, for the purpose of blessing the nuptials; and again, it has been suggested and argued that the presence of a priest was required, in order that he might see that everything necessary to give validity to the ceremony was rightly and fitly performed, and that he might be able at a future period to bear testimony to the *factum* of the marriage. Whatever may be the weight and nature of those arguments in reference to regular marriages, I find great difficulty in applying them to the case of an irregular marriage; for, no doubt, it will be found in several of the authorities to which we have been referred, that it was not essential to the validity of such a marriage that the clergyman should take any part in the proceedings; nay, that if he was brought to the place unwillingly on his part, the marriage would be nevertheless good, his "intervening" by his presence alone, whether voluntary or involuntary, being held to be sufficient. For myself, however, I must say that I cannot understand how any one can with propriety be said to "intervene," because he may happen to be present at a marriage ceremony which takes place without his assistance or approval. I must here again repeat that I am speaking, not of a regular marriage *in facie ecclesie*, but of a

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private and irregular marriage. Unquestionably the clergyman is not a necessary witness to prove such a marriage, or any marriage; for the fact of marriage may be proved by other witnesses as by the clergyman, even though he may have "intervened" in the ordinary sense of the term, and may have performed the ceremony. The bishop, on a question involving the validity of a marriage being sent to him by the Temporal Courts, was not bound to summon the clergyman as a witness, to prove the *factum* of marriage; at least I have seen no case in which such a proceeding was held to be necessary.

And then with regard to the religious element, as it has been called, I should be slow to hold that a marriage was void, and to issue bastards, because the attending clergyman had omitted to perform the sponsals; and great as that neglect would be on the part of a clergyman taking part in the ceremony, we must never forget to recollect that in all irregular marriages there are some, and at times very many, omissions in point of ceremony, and yet we have a plentiful supply of authorities to show that such marriages are therefore void. If it were necessary that every ceremonial should be strictly observed, to constitute a valid marriage, there could be no such thing as an irregular marriage. I would understand *Regina v. Millis* as deciding that, to make a marriage *per verba presentis* "loyal matrimony," there should be a clergyman, episcopally ordained, present at the ceremony; but that, if such a clergyman was present, a very simple form of words would be sufficient, and that it would not have been necessary to go through the marriage ceremony as prescribed for regular marriages.

If I am right in that (and I feel very strongly of opinion that I am), I get rid altogether of the argument founded on the supposed difficulty of paraphrasing the marriage ceremony, or of departing from the form given in the Book of Common Prayer, or of supposed inconsistency of the parties presenting themselves to each other, and the like: all which arguments appear to me to consist of too much of mere matters of form and ceremony, and to be too little of substance in them to be of any great weight. We must look to the substance of things, rather than mere words.

Had any ordained clergyman, other than the Rev. Samuel Swayne Beamish, been present at the marriage ceremony now under consideration, it could hardly have been contended that the marriage was not perfectly valid. Had an ordained clergyman been present at the marriage of George Millis, the defendant in *Regina v. Millis*, can it be supposed that the marriage in that case would have been held invalid, because the ceremony as performed in the case was not in exact conformity with the ceremony as set out in the Book of Common Prayer? But in the case now under consideration, it appears that no other clergyman, except the Rev. Samuel Swayne Beamish, was present at the time when the ceremony of marriage was performed between him and the lady whom he intended to make his wife; and that, I admit, raises a very important, difficult and novel question. If the presence of the clergyman is necessary as a witness, that requirement could not, in my opinion, be satisfied in the present case. But I have already stated that I do not think the presence of a clergyman was at all indispensable for that purpose, at least I can find no case or authority by which the affirmative of that proposition is established to my satisfaction; and with regard to the religious element—if that be essential to give a legal validity to the ceremony (upon which I do not mean to express any opinion)—I think it sufficient to say that, in my opinion, Mr. Samuel Swayne Beamish was as competent to invoke the blessing of Almighty God on himself and on the woman with whom he then intended to intermarry, and on their spousals, as any other priest or clergyman. It is not the clergyman who blesses, or can of himself bless, the parties or their nuptials; all he can do is to invoke a blessing from God; and that was in fact done in this case, and done, if it be essential that it should be so done, by a clergyman in holy orders episcopally ordained.

Then as to the argument arising from the supposed inconsistency of the intending husband being the party to hear and adjudicate on any objections that might be made to the marriage, I admit that the position of Mr. Beamish was, in that respect, highly objectionable; and that is one of the circumstances that constitutes the irregularity of the marriage: but this is an objection which more

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or less pervades all private marriages. It is not likely, in a private marriage, that the parties themselves will object to the performance of the ceremony, and it can scarcely be imagined that there be any one else there to do so; and yet a marriage may be good and valid in law, though private.

Admitting, however, that Mr. Beamish's position was objectionable as has been contended for, does that make the marriage a nullity? I should say not. We have instances of marriages involving objections more in opposition to the canons of the church than the objection to which I have last referred, and which have nevertheless been held good in law. To avoid a marriage solemnized entered into between two parties, and to make such a marriage a nullity, there must be some nullifying clause or provision in the law—whether it be the Common Law, the Canon Law or the Statute Law—and I find no such nullifying provision in the Marriage Law of England, in reference to the objection to which I have last referred. All private marriages—no matter how many clergymen may have been present—I mean marriages celebrated otherwise than in the church, *ecclesia*, were contrary to the ordinances of the church; and the persons so intermarrying, and the clergymen celebrating such irregular marriages, were all subject to ecclesiastical censure. But the marriages were even though the person celebrating was a degraded clergyman or a Roman Catholic priest, where the parties were Protestants, and in some instances where he was no clergyman at all, were nevertheless held good in law; and why?—Because, however objectionable and improper the conduct of all such parties might have been, and however opposed to the ordinances of the church, and to the general policy of the Marriage Law of England, there was no sufficient nullifying provision discovered in the law to make such marriages absolutely void; and so they were held, in defiance of what I may so express myself, of their irregularity, to be valid in law, and binding on the parties.

But it is next said that the marriage in this case was not celebrated in the presence of witnesses, and that it is for that reason void. That is an objection that pertains more to the proof of a marriage than to its validity. No doubt, a party who is not

discreet as to contract such a marriage may find a difficulty in proving it; but nevertheless, the marriage is the same as between the parties, and in the eye of God, as if there were hundreds of witnesses present; and I, for one, shall not assent to the annulling of a marriage good in the sight of God, and intended to be binding on the contracting parties, on such a ground as this. But in this case the *factum* of the marriage has been proved, and has been found by the special verdict, and I have no desire to go behind that. But suppose a suit in the lifetime of the husband (if I may call the Rev. Mr. Beamish such), for restitution of conjugal rights, and that he confessed the marriage, could he be allowed after that to say that the marriage was a nullity, because there were no witnesses present? The fact of the marriage is one thing, the proof of that fact another and a very different thing, and we have the fact found in this case.

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But next it is said that the Common Law cannot be considered as having ever authorised the marriage of an ordained priest under any circumstances; because that, originally, that is, before the Reformation, and at least from about the year 1076, a Roman Catholic priest could not, according to the laws and canons of the church, enter into a contract of marriage: that may be so, though I am not sure that the proposition has not been laid down somewhat too generally. But whatever restraint those ecclesiastics were subject to during the early period of our history, it is plain that, from the Reformation, they were not prevented by the Common Law of England from marrying; they were from that time invested with all the powers and privileges that were exercised and enjoyed by the rest of the subjects of this realm in that respect; and they were as free to contract matrimony as any one else.

No doubt, as long as a priest was disabled by law from contracting matrimony, he could neither be married by the "intervention" of any other priest, nor by himself. But as soon as the Common Law underwent a change as to the power of the priest to contract matrimony, then the peculiar reason which has been assigned for his not being able to marry himself ceased, and the reason ceasing, the rule, so far as it was founded on that reason, ceased also. I therefore



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take it that the marriage of a priest or clergyman is to be judged of not by the old law that existed prior to the Reformation, but by the law as changed and modified in that respect at the time of the Reformation, and which subsequently prevailed in England and this country.

Upon those short grounds, and without going more at length into the case, I am of opinion that the marriage in question in this case was good in law, and that the judgment below ought to be affirmed.

PERRIN, J.

The question in this case is, whether the defendant in error was a contract of marriage entered into between his father and mother, and whether that contract was solemnised in the presence and with the intervention of a priest in holy orders? In *Rex v. Millis*, Parke, B., uses these words:—"Unless the marriage had and solemnised in the presence of a priest, it is not a marriage." The word "intervention" is studiously brought in by Lord Cottenham, and so it is here stated; therefore, I take the question is, whether this contract between these parties was openly and advisedly entered into in the presence of a priest in holy orders?

Difficulties have been raised upon the result of the evidence, upon an imagined contradiction or inconsistency arising upon the phraseology of the Book of Common Prayer, in the form for solemnisation of matrimony, as used on ordinary occasions, and the change that must have taken place in order to reconcile this with what has taken place in this case. There has been a confusion as to whether the words of the ceremony could be pronounced by the parties themselves. These words have nothing to say to the validity of the marriage: the real and important part of the ceremony consists in this—"I, M, take thee N, to my wedded wife," &c.; and the woman says—"I, N, take thee M, to my wedded husband," &c.; and then the man puts on the woman's finger a ring, and says—"With this ring I thee wed," &c. So that all is the language of the parties; the marriage is a contract.

between two parties, and not between them and the priest who appears to be present or not.

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In the old books, where the discussion is entered into, it is distinctly laid down that the priest is not the minister of the sacrament, but the contracting parties, the minister perfecting the Sacrament; he is the minister of the Sacrament who is the minister of the contract, and as the contract is of the essence of the Sacrament, the parties who minister the contract may minister the Sacrament of the contract. After the ring is put on, a prayer is pronounced by the minister, "O God, send thy blessing upon these thy servants, this man and this woman, whom we bless in thy name." The meaning of that is, "send thy blessing upon those upon whom we invoke thy blessing." Would that be an unbecoming prayer? Might it not consistently fall from the lips of an honest man? Mr. Beamish might have said every word of that without breaking a word of grammar.

It is said that inasmuch as this marriage was clandestine, it was void. It certainly was clandestine, irregular and indecorous, as a performance of the solemnisation of the marriage contract, yet, was it no contract? Was not that contract binding? Is this marriage contract, in this strong and most impressive form of the ritual, a nullity? Is his declaration that he takes her as his wedded wife, and her declaration that she has taken him as her wedded husband, a nullity, and if so, by what law? Is it a contract in terms or in form?

It is no sufficient objection that it was not before witness, or *in facie ecclesiae*, but because the priest was one of the contracting parties. Where is there such a rule? The case of *Regina v. Millis* does not go that far. It is of little consequence whether that case satisfies me or not; but does it nullify this contract? The law upon the subject is very obscure. Lord Cottenham commences his judgment by saying, that in the course of a long professional life he never met so embarrassing a case, and that it was impossible to come to any conclusion without overruling other authorities; and Lord Lyndhurst says:—"I abstain from referring in detail to the convictions for bigamy in Ireland, in cases of

H. T. 1857. "marriages not authorised by the Legislature, because the  
*Exch. Cham.*  
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 BEAMISH. "the very subject of the present appeal; but I freely admit  
 "the opinions of the learned Judges, under whose direction  
 "convictions occurred, are entitled to the greatest respect."  
 therefore would say that there is no judgment distinctly  
 pronounced in any Court of Common Law, with the exception  
 the judgment pronounced by Lord Tenterden in *Berrie v. W.*  
 and, in my judgment, *Regina v. Millis* does not meet  
 view I have taken of the present case. I rely on the principle  
 that a most necessary, universal and important contract that  
 be entered into between man and woman, when entered into  
 fairly and upon due consideration, should not be dissoluble to  
 prejudice of one or both the parties; a contract obligatory  
 framed by a most perfect code. I rely on the unquestioned value  
 of Quaker marriages for more than 150 years, to which no act  
 was given. It is, no doubt, very desirable to uphold the  
 celebration of marriage; for not only the parties themselves  
 the community are deeply concerned in the new character in which  
 each party contracts, and in the necessary performance of the  
 solemnities which are by law required. These have, in my  
 opinion, been performed in this case; and, upon the whole,  
 think this contract was perfectly and legally solemnised, and  
 that the issue of this marriage are legitimate, and, therefore,  
 that the judgment of the Court below ought to be affirmed.

CRAMPTON, J.

It fell to my lot to deliver judgment in the Court below. The  
 reasons upon which that judgment was grounded have been  
 unsparingly dissected on the present occasion. I shall not now  
 state them, or discuss their validity. The judgment is printed  
 the reports of the Queen's Bench, and let the arguments for and  
 against that judgment stand on their respective merits; but I have  
 to announce that, notwithstanding able arguments I have heard  
 this Court, my opinion on the whole case remains unchanged.  
 think the judgment in the Queen's Bench should be affirmed.  
 have stated that I do not mean to go over again the reasons upon

which the judgment of the Court below was based ; but I shall make a few observations on some of the arguments we have heard in this Court.

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A vast deal of learning and of reasoning has been used to show that the marriage in question was an irregular and a clandestine marriage, and thence to infer its invalidity. Now, it must be at once admitted that the marriage was irregular and clandestine ; but does it follow from thence that it was invalid ? By no means ; the acknowledged doctrine, as stated by Lord Stowel, in the great case of *Dalrymple v. Dalrymple*, after the quotation of many authorities, is, that an irregular marriage, a clandestine marriage, is as valid in law as the most regular marriage is.

The Law of Scotland was relied upon during the discussion, and it was said that the presence of witnesses was necessary to the validity of a marriage contract, *per verba de presenti*, in Scotland. The Law of Ireland is not to be governed by the Law of Scotland ; but if it were, I apprehend such is not the Law of Scotland. It is true, that one of the authorities referred to by Lord Stowel does seem to lay down such a doctrine, and the words of that authority are cited by Lord Stowel ; but they are cited by him not to affirm, but to criticise them. Lord Stowel's own opinion is to the contrary. A mistake on this subject seems to have grown out of a confusion between *the contract* and the *proof* of the contract ; these two are perfectly distinct : a marriage contract, like any other contract, may be made in the presence or in the absence of witnesses ; and if made without witnesses, the contract may be unavailing to the parties, because it cannot be proved ; but as between the parties, and in the sight of God, it is a contract still. Should all the witnesses to a contract, *per verba de presenti*, have died before a question arose between the parties to it, that contract could not be enforced, because there would be no proof to evidence it ; and thus in a loose way it may be said that a marriage contract, *per verba de presenti*, when no witness is present, is an invalid marriage. But accurately speaking, such contract is valid ; but it becomes for want of proof practically invalidated.

I shall only now refer to a case cited, after the close of his

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argument, by Dr. *Gayer*; it is the case of *Harod v. Harod* (a), decided by Vice-Chancellor Sir P. Wood. I read it, because it was not noticed by any of my Brethren, or in the Bar, except by Dr. *Gayer*. *Harod v. Harod* was decided by a high authority, and it bears importantly upon more than one of the main points in the case before us. The Vice-Chancellor, giving judgment, thus lays down the law of marriage in England before the Marriage Act (p. 855):—"Everything which is presumed in favour of the marriage. The contract of the marriage is simply this: it is quite independent of the religious part of the ceremony; it is simply an understanding between a man and a woman to cohabit with each other, and with each other during their joint lives. That is all that is required by the law of Scotland, and that is all that is now required by the law of England: persons may be married before a registrar without any religious ceremony whatever. The religious element which has been introduced requires nothing more from the parties—that is not added by the church. Nothing is required on the part of a person to be married except this consent—the rest is the duty of the church, done in their presence, and for their behoof." And he says (in p. 855):—"Although our law requires some forms, such as banns, &c., yet it has never been held that the repetition of precise words in the order of matrimony is necessary. There have been cases—I believe cases are not uncommon—when the responses have been purposely omitted. I allude particularly to the omission of the undertaking to 'obey' on the part of the female; but I apprehend that when the parties have given each other their hands with tokens of assent, and the priest has declared them to be man and wife, the omission of any particular part of the formula of words would be a totally inadequate circumstance to impeach the validity of the marriage."

I therefore think that, although the wording of the form has been departed from in this case, still there has been a substantial compliance with it—that the marriage was legal, and, therefore, that the judgment of the Court of Queen's Bench should be affirmed.

PIGOT, C. B.

I am of opinion that this was a valid marriage: and but for the decision in *Regina v. Millis* I should have been of opinion that a marriage *per verba de presenti*, without a priest, was valid, on the ground stated by Tindal, C. J., "that whatever at any time has been held by the law of the church to be a sufficient religious ceremony of marriage, the same has at all times satisfied the Common Law of England in that respect."

When the Roman Catholic Church was the Established Church, marriage was a Sacrament; something more than a mere civil contract. Prior to the Council of Trent, the parties to the contract were considered to be ministrants of this Sacrament to each other. Numerous decrees were from time to time pronounced for the purpose of discouraging clandestine marriages, and requiring the presence of a priest at the marriage contract; and although disobedience of those decrees rendered the party liable to ecclesiastical censures, yet no decree has ever been pronounced declaring the marriage void if not celebrated with such intervention. Marriage then being a sacramental contract, this is probably the reason why in no instance, save the canon of *Lanfranc*, is there to be found a canon declaring a marriage without such intervention to be void. If then the law of the church treated the marriage as a Sacrament, it is plain the Common Law must have been satisfied; and, in the language of Tindal, C. J., whatever has been held by the law of the church to be sufficient ceremony of marriage, the same has satisfied the Common Law of England in that respect. Such is my view of the Scotch Law, and not only of the Scotch Law but of the Law of England prior to the Reformation.

But I am bound by *Regina v. Millis* to hold that the Common Law requires some religious ceremony, and that a clergyman must be present; but that case decides nothing more. It is impossible to collect from the opinions of any of the Judges in that case what was essential to validate a marriage. But holding, in deference to that opinion, that some religious ceremony is necessary, was there such a presence and such a ceremony as is required? For the reasons stated by the Judges who have preceded me, as well as

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those given by my Brother CRAMPTON in the Court below. I am of opinion there was a sufficient compliance with the requirements of the law in this case. A priest was present, a ceremony performed by a priest; and I find nothing in the judgments delivered in the House of Lords involving a condemnation of the marriage so solemnised. It is a mistake to suppose that it was the purpose of marrying the parties the priest was to be present. No such proposition was put forward in that case as to whether a priest could marry himself; and the question now is, whether a marriage at which a priest assists is void because he was one of the contracting parties?

It has been said that some authority ought to have been shown to show that such a marriage was valid. It is hardly possible that such a case could have occurred prior to the Reformation. From an early period of the church, marriages of the regular clergy were *ipso facto* void. The vow of celibacy made void such a contract. With respect to the secular clergy, a great difference of opinion existed; and the current of authority leads to this conclusion, prior to the Councils of Lateran, the taking of holy orders was not of itself an impediment to marriage. We have one solitary case in which a question of this kind arose in a Court of law. According to that, it was held that the marriage of a deacon was not void, but voidable. Such case is referred to in 12 *Coke* and will be found under the head of "*Bastardy*," in *Brooke's* and *Fitzherb. Abr.*, and in the *Year Book*, 19 *Hen. 7*, tit. *Bastardy* 33; 2 *Hen. 7*, 39 *b*; and what occurred in the early part of the reign was referred to. There the question arose in a writ of *habeas corpus* before the Judge of the county, and a special verdict was found. It was brought into the Exchequer Chamber, and it was there held that, although the marriage of a regular clergyman was void, the marriage was voidable only, and not void. This authority dispels the opinion that there was something in the Common Law inconsistent with such a marriage, that is, treating such a marriage as null and void. This is the only instance to be found in the books in which a question has been raised as to the validity of a priest's marriage; and the fact of its being a solitary case shows how rare

attention is to be paid to the argument arising from the absence of express authority.

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Another topic I shall refer to, namely, the observations on the Book of Common Prayer. I concur in opinion with those Members of the Court who conceive that what has been done by the clergyman in this case was not, and did not approach to anything deserving the name of, blasphemy. We are bound to assume that the parties to this contract entered into it with honesty and good faith; we are bound to assume that Mr. Beamish intended to enter into a good and binding contract. That it was irregular cannot be denied. But when we consider the character of Mr. Beamish, and the sacred nature of the duties which he had to discharge, must we not say his first object would be to employ the most solemn form of words, to lend the most solemn sanction of religion to the contract? If this had been a marriage in Scotland, could it be said to have been an improper use of the Book of Common Prayer, to have applied it to such a contract? Could we say that the employment of language pertinent to the subject, so far as it was applicable, was objectionable, because found in the ritual? It would appear more reasonable, as he was departing from it, that he should depart from it as little as possible, by using as nearly as possible the language of it. It has already been shown how inconsistent with the principles of the law relating to marriage it would be, to hold that it was necessary to employ all the words in that form. I therefore can see nothing to show infirmity in this marriage, nothing inconsistent with the manner in which the ritual has been used.

I can only add that, in my opinion, we are clearly bound by the case of *Regina v. Millis*, and that in this case there has been a sufficient presence and intervention of a priest in holy orders; that the requirements of the law have been complied with; that this is a valid marriage, and therefore that the judgment of the Court below should be affirmed.

MONAHAN, C. J.

I felt peculiar difficulty in approaching the consideration of this most important case, as during my professional and judicial ex-



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perience I had not occasion to consider, with any particularity Ecclesiastical Law relating thereto. I have, however, considered the arguments addressed to the Court, and the authorities referred to; and upon the whole, I am of opinion that the reasons I shall presently state, that this was not a valid marriage, and that the judgment of the Court below ought to be reversed.

The facts of the case have been fully stated by my Brother KEOGH; but in order to make my judgment intelligible, it is necessary that I should refer again to the special verdict, because it is that, during the argument, and in some of the judgments that have been pronounced, matters have been assumed to have been in the special verdict which I do not find it to contain. The facts in the special verdict are these: That in and prior to the year 1831, Rev. S. S. Beamish was a clergyman of the Established Church of England and Ireland, and that on the 27th of November 1831, in a room in a private house, no person being present but the contracting parties, he read the form of solemnisation of matrimony of the Church of England and Ireland, and then and there declared that he would take this woman as his wife, and the woman then and there declared she would take him as her husband. There is no statement in the special verdict that by so doing either party intended to create the relation of husband and wife, nor is there any statement that during his long life the said S. S. Beamish ever treated or acknowledged this woman as his wife; there is but the one finding, that the marriage was consummated, and that there was issue one child, a son; and the question is—is that child entitled to inherit the property of which his father died seized in fee simple?

We have heard a long argument that, by the Common Law, a contract *per verba de presenti* constituted a valid marriage, and that all that the law required was that the husband and wife should enter into this contract, *per verba de presenti*. I entertain very serious doubts whether even in Scotland such a marriage as the present would be considered such a marriage as to legitimise the issue; this is, whether a contract *per verba de presenti*, entered into between

the parties, without the presence of any person, and without having been acknowledged during the lifetime of the parties, is a valid marriage? There is no authority, that I am aware of, deciding that each constitutes a valid marriage. The question could not arise in *Dalrymple v. Dalrymple*, because the evidence there was documentary—First, there is the following document, No. 1, indorsed, “A sacred promise”—“I do hereby promise to marry you as soon as it is in my power, and never marry another;” signed, “J. Dalrymple.” And “I promise the same.—J. Gordon.” That was admitted not to be a sufficient contract, it evidently referring to something to take place at a future period. The second document is:—“I hereby declare that Johanna Gordon is my lawful wife.—J. D. May 28, 1804.” And under that is written:—“And I hereby acknowledge J. Dalrymple as my lawful husband.—J. Gordon.” There is then the document No. 10:—“I hereby declare Johanna Gordon to be my lawful wife, and as such I shall acknowledge her the moment I have it in my power.—July 11, 1804—J. Dalrymple.” “I hereby promise that nothing but the greatest necessity (necessity which . . . situation alone can justify) shall ever force me to declare this marriage.—J. Gordon (now J. Dalrymple)—July 11, 1804—Witness, Charlotte Gordon.” Lord Stowell fills up the blank there by reading the word “pregnant.” The question that arose in that case was—whether, according to the Law of Scotland, these parties were husband and wife? Lord Stowell, in that case, thought (as nobody can doubt he was right in thinking), that he had nothing to consider in relation to the Law of England, save to hold, as he did, that by the Law of England the validity of a marriage celebrated in a foreign country, or anywhere out of England, was to be determined according to the law of the country where the marriage was celebrated; and that his duty was to ascertain, as best he could from the materials before him, what the law of the country was in which the alleged marriage was celebrated. Accordingly he states, in his judgment, three classes of authorities from which he derives his knowledge:—first, the opinions of text-writers on the subject; secondly, the opinions of advocates and Judges examined as witnesses in the case upon the

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question; and thirdly, the authenticated or ascertained adjudication of the tribunals of Scotland upon these subjects; and from these materials he came to the conclusion that, according to the Law of Scotland, the presence of a clergyman was not required. No doubt he states that, according to the general Canon Law, a contract *verba de presenti* constituted a valid marriage; but he said the only question was, how far that was adopted by the law of this country according to which he was to decide? and the only matter upon which there was even any question in that case, was—when was a contract *per verba de presenti*, or *de futuro*, consummation necessary to make the parties husband and wife? He came to the conclusion that where there was a contract *per verba de presenti* where the parties intended to take each as husband and wife, and when that was evidenced by the handwriting of the parties, he did not require the marriage to be consummated; but he finally decided that if consummation were necessary, he would presume from all the evidence in the case, that there was consummation. He came to that conclusion principally on the document No. 1. He therefore decided, clearly and unqualifiedly, that this was a valid marriage, and rendered void a subsequent marriage.

As I have already stated, I entertain very great doubt that a contract as is found by the special verdict in the present case would be held even in Scotland to constitute a valid marriage. There was no such question involved in the *Dalrymple* case as in the present case. So far as I can see, the parties never lived together, or were recognised as husband and wife; and I confess I have not the extraordinary feeling for persons who thus outrage public decency. If a man, whether clerical or lay, get a woman to cohabit with him, whom the public have no means of knowing was his wife, it is himself he has to blame if the law will refuse to legitimise the issue of such a connection. Sir Ilay Campbell, in his evidence in *Dalrymple v. Dalrymple*, says, "That the consent which is necessary to constitute the matrimonial contract in irregular marriages must be deliberate and serious; clearly denoting the intention of the parties to become husband and wife, and be attended with no ambiguity." And again he says:—"An irregular mar-

riage may be constituted, or rather, it may be said, proved in various ways: first, by cohabitation as husband and wife at bed and board, and general habit and repute. This has even been sanctioned by statute, and forms a presumption so strong scarcely to be called in question. Secondly, by promise *de futuro* and *copula* following upon it; because the engagement, though having a reference to future time, is supposed to be perfected by the act of consummation, and rendered a present contract, if there be no middle impediment to bar the claim. Thirdly, by formal acknowledgments, *per verba de præsenti*, either in writing, or declared before witnesses, though not in the presence of a clergyman; but these must appear to have been made with the deliberate intention of living together as husband and wife, and must be attended with personal intercourse, if not subsequent, at least prior; otherwise they will resolve into a mere *stipulatio sponsalitia*, similar to what is in every contract of marriage in the Scots form, which proceeds on a recital that the parties have accepted of each other as husband and wife, but which may be resiled from, *rebus integris*." In this particular case I take it to be the opinion of this very eminent man that, in order to render a declaration *per verba de præsenti* valid, it must be in the presence of some third party; and in the case of *Butler v. Lord Mountgarret*, I am informed the Scotch lawyers deposed that to render valid a marriage in Scotland, there being no writing, the acknowledgment should be made either in the presence of two witnesses, or of one witness, with corroborating circumstances. I am by no means satisfied that the general Canon Law of Europe did not require something similar, and such I find to be the opinion of Lord Tenterden, in *Beere v. Ward*. He says:—"The marriage might lawfully be celebrated in a way in which the proof of it would be extremely difficult; that might be, for it might be celebrated at any time, and in any place, by a clergyman; nay, as I understand the law, it might be equally celebrated without a clergyman; for a declaration by the parties in the form of a contract, that they were man and wife, a contract *per verba de præsenti*, made between them, and a declaration of that in the presence of witnesses, would at that time have been made a

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*Esch. Cham.* He appears to me to draw the same conclusion from the Scotch law  
 that I do; and in *Lyndeswode* (cited in 10 *C. & F.*, p. 58)  
 I find this statement:—"In the the constitution itself the dis-  
 tinction 'or' is used, as if either priests or other public persons  
 "(that is persons known in the place) might confer by their  
 "presence a validity on the ceremony." And in the same work  
 observed, "priests are not mentioned by *Lyndeswode*."

It is not necessary that I should pursue this portion of the subject  
 further; for whatever our individual opinions may be as to the  
 propriety of the decision in *Regina v. Millis*, we are all bound  
 by it as an authority; and so far as I individually am concerned  
 I am of opinion that that case was rightly decided, and I am  
 fortified in that opinion by the preponderance of judicial authority.  
 In Ireland, three out of four Judges were of opinion that the  
 presence of a clergyman was necessary. In England, all the  
 Judges were unanimously of opinion that by the Common Law  
 of England, for all purposes the presence and intervention of a  
 priest in holy orders was necessary to give validity to a mar-  
 riage, and that without such intervention there could be no such  
 thing as a marriage; that the woman could have no dower, and  
 children could not inherit, and the parties could not be prosecuted  
 for bigamy. In the House of Lords, three of the Law Lords were  
 of opinion that the presence of a priest in holy orders was necessary,  
 and that a Presbyterian clergyman was not a priest within the  
 rule. Therefore, the real ground of the decision in that case,  
 assuming we are bound by it, was, that a contract *per verba et  
 presentia* was not by itself sufficient, but that the presence and  
 intervention of a clergyman in holy orders was necessary to con-  
 stitute a marriage.

The next question is, what is the presence and intervention  
 of a priest, as required by the Law of England? May he be one  
 of the contracting parties, or must he be a third person? Tan-  
 dal, C.J., in delivering the opinions of the Judges, in the case  
 of *Regina v. Millis*, makes use of some observations, not in  
 my opinion, inapplicable to this question; I allude to that part

his judgment in which he considers the question whether the rule requiring the presence of a priest was complied with, by having the presence and intervention of a Presbyterian minister. In p. 686, having stated the authorities that satisfied him that the presence of a priest was required, he says:—"We now pass to the consideration of the particular circumstances involved in the first question proposed, which supposes the marriage to have taken place in the house, and in the presence of a placed and regular minister of the congregation of Protestant Dissenters called Presbyterians. As we have already stated our opinion that, to make the marriage a complete marriage, it must be solemnised in the presence of a minister in holy orders, it is only necessary to look back to the time when that law first obtained in England, to enable us to answer that question without difficulty. At the early period when such law arose, and down to a comparatively recent period, the expression priest, curate, minister, deacon, and person in holy orders, which are the words met with in the different constitutions and councils, and authorities bearing on the subject, could point to those persons only who had received episcopal ordination; there were no others known at all; all but they were laymen; and unless some Act of the Legislature has interposed its authority, and given the Protestant Dissenting minister in Ireland the same power for this purpose as the person in holy orders did before possess, we think the entering into the contract in his presence cannot, in the legal sense of the word, be held to be entering into it in the presence of a person in holy orders." I confess it occurs to me that this reasoning may be applied to the facts of the present case. The question we are considering is, whether the rule requiring the presence and intervention of a priest at a marriage, to render it valid, requires that that priest should be a third person, or is satisfied by his being one of the contracting parties? The first question is, would that rule, when first established by the Common Law, have been complied with by the priest being one of the contracting parties? It is not necessary, on this occasion, to enter into any very minute inquiry as to when first celibacy was enjoined

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H. T. 1857. on the clergy of the Roman Catholic Church. No doubt, the rule existed during the early period when, as far as we can ascertain, the rule requiring the presence of a priest at a marriage, to render it valid, was established by the Common Law of England; and there can be no doubt but that rule of celibacy on the priesthood was recognised by the Common Law of England; and the passage which has been referred to in *Coke's Rep.*, p. 9, and the cases there referred to, established by the Common Law, the marriage of a secular priest was not void, and that of a regular absolutely void; and so matters remained until the 31st year of *Hen. 8*, when, by the Act of the 31st *Hen. 8*, c. 14, it is declared that priests, after the order of priesthood received, may not marry, by the law of God, and persons marrying are declared guilty of felony. And so matters continued until the 2 & 3 *Edw. 6*, c. 21, when all rules, ordinances, and statutes prohibiting the marriage of priests, are repealed; but by the recital of the statute of 5 & 6 *Edw. 6*, it would appear that a subsequent statute was considered necessary, or at least, advised to render legitimate the children of such marriages. When, therefore, in the year 1540, the statutes of *Edmund*, which have been referred to, declared there shall be a mass priest by law, who, by God's blessing, bind their union to all posterity or posterity, and when, in 1576, the ordinance declared that a marriage without the priest's benediction renders the connection no better than fornication, and when similar ordinances were promulgated in 1575 and 1200, can it be doubted that the priest required by the Common Law to be present at a marriage was a third person who alone could celebrate a valid and binding marriage, and not one of the contracting parties, whose own marriage, even if celebrated in presence of a third person in orders, could be only void or voidable? and I am confirmed in the view that the Common Law required the priest to be a third party, that I do not find in any book of the Common Law a suggestion of a priest having married himself.

If I am right in the supposition that, prior to the reign of *Edw. 6*, the priest, whose presence and intervention was necessary to render

marriage valid, was a third person, it would only remain to inquire whether statutes of that reign, declaring and enacting that priests may lawfully marry, make any change in the previous state of the law requiring the marriage to be in the presence of a priest a third person? So far from the statutes of *Edw.* having any such effect, it appears to me that they lead altogether to a different result. The 3rd section of 2 & 3 *Edw.* 6, enacts, "that nothing therein contained shall extend to give liberty to any person to marry without asking in the church, or without the ceremony appointed by the Book of Common Prayer;" and the 3rd section of the 5 & 6 *Edw.* 6, c. 12, contains a similar provision: and in my opinion, it is only necessary to read the marriage service in the Book of Common Prayer, to be satisfied that it was thereby intended that the priest present and intervening at a marriage should be a third person.

When, therefore, I find, if I am right in the view I take, that prior to the reign of *Edw.* 6, the priest, whose presence and intervention was required, must have been a third person; and when I find, that though the statute of *Edw.* 6 rendered it lawful for priests to marry, yet that that statute and the Book of Common Prayer clearly required, or at least intended, that the marriage ceremony should be performed by a priest, a third person, and when in our law books, prior to the reign of *Edw.* 6, and thence down to the present time, I find no trace of a single instance where a priest attempted to marry himself, except in the case of *Holmes v. Holmes*, in which it was put forward and relied on not as a marriage, but a contract, must not this be taken to be a contemporaneous and continuous exposition of the rule of the Common Law on the subject?—and when, for the reasons stated at length by my Brothers KNOX and GREENE, it is clear to my mind, that some at least of the essential purposes for which the presence of a priest was required would not be obtained by holding it sufficient if one of the contracting parties was himself the priest, I cannot bring my mind to the conclusion that, by the Common Law of England, a priest in holy orders could legally marry himself.

I do not think it necessary to consider the question argued at

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*Erch. Cham.* jurists, the parties, and not the priest, administer the Sacrament  
 of matrimony to each other? This consideration, if good in  
 BEAMISH purpose in the present case, would tend to prove that the presence  
 v. of a priest was not at all necessary; this, however, I consider  
 BEAMISH. concluded by *Regina v. Millis*.

On the whole, I am of opinion that the judgment of the Queen's Bench should be reversed, and judgment given for the plaintiff in error.

LEFROY, C. J.

In this case the subject is well nigh exhausted, and I cannot add little to what the industry and talents of the Bar and the Bench have already furnished. Indeed I might feel excused from saying more than expressing my opinion as to the judgment to be pronounced by this Court; but as I was not a party to the judgment below, in consequence of not having heard the arguments in that Court, I feel it right to state fully and distinctly the grounds upon which I am of opinion that judgment should be affirmed. I may however, I think, properly omit the consideration of the questions which have been raised in the course of this discussion. One of them is, whether this would be a good marriage in England? another, whether it would have been a good marriage 900 or 1000 years ago? or whether it would be a good and lawful marriage as between two of her Majesty's Roman Catholic subjects. All these points appear to me unnecessary to decide upon in the present inquiry. I purpose to confine myself to the question which the jury ask for the opinion of the Court upon the special verdict set out upon this record, namely, whether the plaintiff is the eldest son and issue of the marriage thereby set out, is entitled to the inheritance of his father as his lawful heir? That question I am of opinion, must be decided by the judgment of the House of Lords, in the case of *Regina v. Millis*, which was founded upon the opinion of the Judges of England, as reported to the House by the Chief Justice on their behalf.

In that case the question was raised, whether a mere contract

marriage, *per verba de presenti*, constituted a valid marriage? It was contended that such a contract was not only of the essence, but the sole essence of a valid marriage. The House of Lords, however, held that such a contract was not alone sufficient to constitute a valid marriage, but that with something else it would be sufficient. What that something else is may most properly be sought for, and may, I think, be found in the opinion of the Judges delivered by Chief Justice Tindal; and although between some passages in that judgment there may appear at first sight a shade of difference, they will be found, when taken together, to make a consistent whole, and to furnish a definite and clear rule for ascertaining what is necessary to constitute a legal and valid marriage. It is said in one place (10 *Cl. & Fin.* 655, referring to a mere contract of marriage, *per verba de presenti*), "Such a contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders." Again, in the same page it is said, "That at all times by the Common Law of England it was essential to the constitution of a full and complete marriage that there must be some religious solemnity." From these passages, taken together, we may, I think, collect a clear rule as to the requirements to constitute a legal and valid marriage. These are, as I conceive, a contract of marriage, *per verba de presenti*, made in the presence and with the intervention of a clergyman in holy orders, with some religious solemnity, not described or defined by anything more precise than by the terms "some religious solemnity." There is also another passage in the judgment which appears to me most material to be noticed with reference to the present case; it is that in which the Chief Justice adverts to a distinction made by the law of the church in respect of marriages which it holds to be irregular, but, notwithstanding the irregularity, are held to be legal and valid, and on which it is followed by the Common Law. He says:—"Where the church has held, as it often has done, down to the time of passing the Marriage Act, that a marriage celebrated by a minister in holy orders, but not in a church, or by such minister in a church, but without publication of banns and without license, to be irregular, and to render the parties

H. T. 1857.  
*Exch. Cham.*  
 BEAMISH  
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H. T. 1857. "liable to ecclesiastical censures; but sufficient, nevertheless, to  
*Each. Cham.* "stitute the religious part of the obligation, and that the marriage  
**BEAMISH** "was valid notwithstanding such irregularity: the law of the land  
**v.** "has followed the Spiritual Court in that respect, and held the  
**BEAMISH.** "marriage to be valid." We have now, I think, all the requirements established by that judgment as essential to constituting a valid marriage.

Now then let us see what the jury find by this special verdict to the marriage in question. They find:—"That the Rev. Samuel Swayne Beamish, being then a clergyman in holy orders of the United Church of England and Ireland, on the 27th day of November 1831, performed a ceremony of marriage between himself and one Isabella Frazer, by reading between them in a room of a house of one Anna Lewis, in the city of Cork, the form of solemnisation of matrimony used in said United Church, as set forth in the Book of Common Prayer, by declaring that the Rev. Samuel Swayne Beamish, then took her, the said Isabella Frazer, to be his wedded wife, and by receiving the declaration of the said Isabella Frazer, which she then and there made, that she took him, the said Rev. Samuel Swayne Beamish, to be her wedded husband, and by the said Rev. Samuel Swayne Beamish placing a ring on the finger of the said Isabella Frazer, and pronouncing the blessing in said form appointed." The jury further find:—"That said marriage was consummated, and that the plaintiff is the eldest son of the said marriage, and was born on the 4th day of January 1841; that there was no other clergyman present, nor any other person in the room where the same was performed, but that the performance thereof was seen by one Catherine Coffey, privately and without the knowledge or sanction of the said Rev. Samuel Swayne Beamish or Isabella Frazer, and that she saw the ceremony performed from a room adjoining said room, but did not hear what passed between said parties." This latter part of the finding cannot affect the case, for we have in the former part a finding of a perfect contract of marriage, *per verba de presenti*, made in the presence of and with the intervention of a clergyman in holy orders, with a religious

ceremony performed at the same time. These are the requirements of the judgment of the House of Lords in *Regina v. Millis*.

H. T. 1857.  
*Exch. Cham.*

Objections, however, have been taken to the sufficiency of this finding, to constitute a legal and valid marriage, which may be reduced to four. It is first objected to on the ground of clandestinity; secondly, that the officiating clergyman was himself a party, and as his presence is required as a witness on behalf of the church to the due solemnisation of the marriage, that he cannot be at the same time party and witness; thirdly, it is objected that the form of solemnisation of marriage in the Book of Common Prayer precludes the possibility of its being performed by a clergyman for himself; and fourthly, that no case can be found where it has been decided such a marriage is valid.

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I will consider this last objection first, and I will admit the fact that no such case has been shown; but neither can any case—no, nor any rule or canon annulling such a marriage, be shown. But we have here the fact of a marriage found. Now what is the law of the church when the fact of a marriage is ascertained, though it be only established by an inference from cohabitation, or other like circumstances, far short of the finding on this record? By the law of the church in such a case, the presumption is so strong in favour of the marriage, that whoever would object to its legality is bound to establish the illegality. So far then as the want of a decided case is an objection, it is against him seeking to invalidate the marriage, and it rests upon him who would avoid it to produce an authority to that effect. That such is the law of the church, I find distinctly laid down in our Ecclesiastical Courts, in the two cases of *Maxwell v. Maxwell* (a), where it is said, “a *de facto* marriage being once proved, it lies on the party denying it to prove its illegality.” And in *Legett v. O’Brien* (b), Dr. Radcliffe observes:—“Here, in my opinion, is sufficient evidence of a marriage in fact, though clandestinely performed: the fact being proved, the presumption of the law is, that it was legally constituted, though irregularly; and the burden of proof of the facts relied on to show that it is void in law is thrown on the party impugning it.” We find the

(a) Mil. 292.

Ibid, 333.

H. T. 1857. same thing in the case of *Harrod v. Harrod* (a), laid down by  
*Esch. Cham.* Vice-Chancellor Sir Page Wood :—" Everything (he says) is  
*BEAMISH* presumed in favour of the validity of the marriage," and he  
*v.* *Swinburne on Espousals*, p. 200.  
*BEAMISH.*

Admitting, then, that no authority can be found for holding a marriage as this to be null and void, and the presumption is in favour of its validity, but admitting it to be irregular, let us see by analogy to other cases, whether it is such an irregularity as should avoid the marriage upon any of the grounds stated? To the first objection, on the ground of clandestinity :—How has the church dealt in all other cases of objections founded on clandestinity? I find in *Gibson's Codex*, p. 425, a canon of 1603, in words following :—" No minister, upon pain of suspension for three years, *ipso facto*, shall celebrate matrimony between any persons without a faculty or license by some of the persons in these our constitutions expressed, except the banns of matrimony have been published three several Sundays or holidays, in the time of Divine Service in the parish churches or chapels where the said persons dwell, according to the Book of Common Prayer; neither shall any minister, upon the like pain, under any pretence whatsoever, join any persons so licensed in marriage at any unseasonable time, but only between the hours of eight and twelve o'clock in the forenoon, nor in any private place, but either in the said churches or chapels where one of them dwelleth, and likewise in the time of Divine Service." This canon was made to prevent clandestinity; and yet it is too notorious to need any authority to show, not only that in each of these particulars, but that in one and all, on some occasions, this canon has been violated; but in no one instance has the church, or the Common Law following the rule of the church, held it a ground for invalidating the marriage: so that otherwise, that I find in a *note* in *Gibson*, subjoined to this canon, this statement :—" In our ecclesiastical records, we frequently meet with absolutions of clergymen who had celebrated marriages clandestinely, and even so late as Bishop Sancroft's time, and in the more antient records, absolutions issued to the minister as

"the two parties ; which sort, as well as separate dispensations, are  
 "very common in our books." This is a strong proof of the in-  
 dulgence with which the church has always dealt with the violators  
 of its formal rules as to the celebration of marriage, where the  
 substance was found to have existence. Indeed I believe I 'am  
 warranted in saying that, until the Council of Trent (which is not  
 adopted in the Anglican Church), no clause of nullity is to be found  
 in any ordinance respecting the ceremony of marriage. It acts  
 with the like latitude in respect of the person to perform the  
 religious ceremony. Originally none but a mass priest, or a cler-  
 gyman in priest's orders, was sufficient ; afterwards, without any  
 statute law, a deacon was held sufficient. It has also been held  
 that a marriage celebrated by an ejected or degraded clergyman,  
 nay, even by one supposed to be a clergyman, and acting as such,  
 has been held good ; and in no instance, even in a strictly matri-  
 monial cause, is it necessary to show letters of orders : *Milward*,  
 p. 332, citing *Lord Hawke v. Corrie (a)*. I may add to these the  
 numerous cases I shall have occasion to refer to for another purpose,  
 in which marriages celebrated by Roman Catholic priests between  
 Protestants have been held valid.

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*Exch. Cham.*  
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The indulgence with which the church treats the violation of its  
 rules in upholding the marriage, and only punishing the irregula-  
 rity, is founded on wise, social and moral principles : the rules are  
 made to establish a system of general order and regularity, but the  
 church does not sacrifice the marriage to matters of form—the sub-  
 stance to the incident. The church considers that it would be  
 mischievous to society and injurious to social happiness, as well as  
 to public morals, for the sake of a rule or order, to degrade one,  
 who, by a solemn contract and vow, designed to become a wife, to  
 the condition of a concubine, and to bastardise her innocent and  
 unoffending issue. The Common Law participates in that just,  
 wise and humane principle ; and we have a proof of that in the  
 case of *Wickam v. Enfield (b)*, where upon an issue of "*Ne  
 unques accouple in loyal matrimony*," the return was—" *Quod  
 vero matrimonio sed clandestino copulati fuerunt*."—*Held*, That

(a) 2 Hag. C. R. 280.  
 VOL. 6.

(b) Cro. Car. 351.  
 29 L

H. T. 1857. "although it be *clandestino*, it doth not vitiate the marriage  
*Esch. Cham.* "*vero matrimonio*, although *clandestino copulati fuerat*.  
 BEAMISH "good as *legitimo matrimonio*."

v.  
 BEAMISH.

The next objection is that which, I think, is really founded on a mere conceit, and not warranted by any authority—namely, that the clergyman present is to be considered as a witness on behalf of the church, to take care that all due solemnities are observed. Somewhat in the nature, I suppose, of a proper officer in civil proceedings to verify the proceedings. There is no warrant for this in the judgment delivered by Chief Justice Tindal, nor in any of the opinions of the Law Lords. If there were any foundation for it, he would be an essential witness for the establishment of the marriage; and yet how many have been established by the testimony of other persons without having recourse to his? How could the irregular marriages celebrated by Roman Catholic priests before Protestants have been established? How could the officiating clergyman in these cases be deemed a witness for the church to which he did not belong—to which he did not acknowledge canonical obedience, and which had no power to censure his irregularity? The upholding of these marriages is the strongest proof how much more the church valued the religious rite, of whatever kind, rather than the strict observance of its rule.

The last objection relates to the performance of the ceremony. It is right, in respect of this, to call attention to the finding of the special verdict. It finds that the marriage ceremony was performed not by reading the whole of that which is appointed for the solemnisation of matrimony in the Book of Common Prayer, but that portion thereof which contains the declaration by the parties by which they reciprocally take each other to be husband and wife, and by reading the blessing thereupon. I think it might have been expected that this statement should have rescued the memory of this clergyman from the imputation of a blasphemous perversion of the whole service. It will be found, upon reference to the Book of Common Prayer, there is nothing in that portion of the service incongruous with a clergyman being at once a participator and an officiating minister; and yet

ing so much he used all that was essential in the form of the service to constitute a valid marriage. What says the Lord Chief Justice Tindal (p. 667)?—"When it is asked, as it was at your Lordships' Bar, what had the priest to do, or what had he to say? the answer must be that he married them, and in doing so, he used such form of words as were customary at the time of his performing the ceremony;" and immediately adds:—"The form of words of present contract, found in the ritual of the Church of England, as established by the authority of Parliament, was not then for the first time made, but in part altered, and in part retained from former rituals;" and adds:—"That even the Council of Trent, when it prescribes certain words to be used by the priest, the decree adds, '*vel aliis utatur verbis juxta receptum uniuscujusque provinciae ritum*;' " clearly showing that the portion of the service containing the words of present contract was, in his estimation, the essential part of the service. He immediately subjoins a reference to the case of *The Queen v. Fielding*, upon an indictment for bigamy (14 *State Trials*, p. 1327):—"The evidence given of the first marriage was, that the parties made a contract *per verba de presenti* in English, in the presence of and following the words of a priest in orders, though he was a priest in the orders of the Church of Rome; and Mr. Justice Powell, in summing up the case to the jury, more than once adverts to the fact that the marriage was by a priest. If you believe Mrs. Villiers (he says), there was a marriage by a priest." Here then we have the deliberate opinion of Mr. Justice Powell in so important a case, recognised by Chief Justice Tindal, that a valid and effectual marriage may be celebrated by that portion of the service which has been used on this occasion. In *Lyons' case* (a), on an indictment for bigamy, the first marriage, which was with a Roman Catholic woman, was celebrated by a Romish priest in England, not according to the ritual of the Church of England, and the ceremony was performed in Latin, which the witness, not understanding, could not swear even that the ceremony of marriage according to the Church of Rome was read;

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(a) 1 East's Crown Law, 469.



H. T. 1857. the defendant was directed to be acquitted ; but Lord Chief Justice  
*Esch. Cham.* Willis, who tried him, seemed to be of opinion that a marriage  
 BEAMISH by a priest of the Church of Rome was a good marriage, "con-  
 v. ceremony according to that church be proved, namely, the v.  
 BEAMISH. "of the contracting part of it." This case is particularly deserving  
 of consideration, as showing the points on the establishment  
 which the marriage would have been deemed valid. There was  
 a priest in holy orders, though not of the Established Church,  
 a religious ceremony of marriage read by him, though not ac-  
 cording to its ritual, further than the words of the contracting part  
 of it. Before this, the case of *Wild v. Chamberlain* (a) had been  
 decided, on a trial before Pemberton, C.J., upon an issue of mar-  
 riage or no marriage. The evidence appeared to be this: that the  
 plaintiff having taken orders according to the Church of England in  
 1663, and ejected in 1668, did contract them in these words:-  
 "I, A B, take thee, B C, for my espoused, betrothed and wedded  
 wife, and will be thy espoused, betrothed and wedded husband  
 until death;" the parson speaking these words, the man repeat-  
 ing them after him, and the woman the like, *mutatis mutandis*  
 and no ring, according to the Common Prayer Book, but ac-  
 cording to the Custom of the City of London, for ten years: Pem-  
 berton, C.J., inclined to think it a good marriage, those being words of contract  
*præsenti*, repeated after a parson in orders; but, upon the im-  
 portance of Counsel, reserved a case. In *Rex v. Inhabitants of Birm-  
 ington* (b), a marriage of a soldier in St. Domingo was held good,  
 which is thus described by Lord Ellenborough:—"This appears  
 to have been *per verba de præsenti*, and to have been celebra-  
 ted by a priest, that is, by one who publicly assumed the office of  
 a priest, and appeared habited as such—of what persuasion inde-  
 cided whether Roman Catholic or Protestant, does not appear; but even  
 were it performed by a Roman Catholic priest, that would not  
 vary the case." He mentioned the *Case of Fielding* as a decision  
 to the like effect as referred to by Chief Justice Tindal. There  
 we have the opinion of Sir W. P. Wood, in the case already  
 referred to (*Jur.* p. 555), with respect to the omission of part of

(a) 2 Shower, 307.

(b) 10 East, 288.

a service in the Book of Common Prayer. He says:—"There have been cases (I believe cases not uncommon) where the responses have been purposely omitted. I allude particularly to the omission of the undertaking to obey on the part of the female; but I apprehend, when the parties have given to each other their hands, in the terms of assent, and the priest has declared them to be man and wife, the omission of any particular part of the formula, of words would be a totally inadequate circumstance to impeach the validity of the marriage." In the absence of any decided case or ordinance of the church, showing this marriage to be null and void, and reasoning from the analogy of what has been held, both in the church and the Common Law, in cases open to the same objections as the present, on the ground of irregularity, I am of opinion that the objections cannot prevail, in this case, to render the marriage null and void. Indeed it appears to me to come fairly within Lord Stowell's description of what, in his view, constitutes a valid marriage, according to the Common Law of England, when he says, speaking of marriage:—"In most civilised countries, acting under a sense of the force of sacred obligations, it has had the sanction of religion superadded; it then becomes a religious as well as a natural and civil contract (for it is a great mistake to suppose that because it is the one, therefore it may not be the other likewise); Heaven itself is made a party to the contract, and the consent of the individuals pledged to each other is ratified and consecrated by a vow to God. This is a description of the substance of the marriage ceremony, as appointed by the Book of Common Prayer, the essential part of which is the solemn taking of each other as husband and wife, as expressed by each, according to God's holy ordinance."

I am therefore of opinion that the judgment of the Court of Queen's Bench should be affirmed.

Judgment affirmed.

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*Queen's Bench*

## OLIVER DOWELL v. EDWARD HUSSEY.

*(Queen's Bench.)*

April 26.

Where, pursuant to the 106th section of the Common Law Procedure Act, the defendant had entered a rule that the plaintiff proceed to trial at the Assizes next after the expiration of twenty days from the service of such rule, and the plaintiff not complying with such rule, defendant entered the peremptory order for nonsuit and his costs; on an application to set aside or vary these rules, without any grounds stated for such rescission, save the *laches* of the clerk of the attorney: *Held*, that nothing but a fatality can prevent the strict operation of the rules; and that the defendant having acted regularly, was entitled to their protection.

BREWSTER (with him *Macdonogh* and *T. R. Henn*) moved that two orders, dated the 2nd of February and 11th of April, be respectively set aside or varied, and all proceedings thereon or thereunder stayed until further order, and that the defendant shall be declared to be only entitled to the ordinary costs of a defendant where a record has been withdrawn, and that it be referred to the proper officer to tax the same.

This was an action of ejectment, begun the 3rd of January 1855, for recovery of certain lands in the county of Kerry. Issue being joined, notice of trial was served for the Summer Assizes of that county, but was afterwards withdrawn. On the 23rd of February 1856, notice of trial for the Spring Assizes was served, which was fixed for the 7th of March last; but on a consultation with special Counsel, had before the day fixed for the trial, it appeared that there was an outstanding lease, and a notice was served on defendant's attorney to know whether it was the intention of the defendant to rely at the trial upon the existence of any temporary bars; and to this notice defendant's attorney gave no reply, and thereupon the record was withdrawn.

On the 2nd of February the usual Side-bar rule was obtained, for liberty to enter judgment as in case of a nonsuit;\* and the plaintiff's attorney swore he did not receive the notice of that order until the 10th of March, owing to some mistake of his clerk.

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\* NOTE.—Order of the 2nd of February was:—"On reading the affidavit of Edward Murphy, the defendant's attorney, it is ordered that the plaintiff do proceed to trial at the Assizes next after the expiration of twenty days from the service of this rule, and in default therein the defendant shall be dismissed, with his costs of suit."

On the 11th of April the following rule was entered:—"On E. T. 1856.  
 "reading the order of the 2nd of February 1856, affidavit of service *Queen's Bench*  
 "thereof, and that plaintiff had not proceeded to trial pursuant to DOWELL  
 "said order, it was ordered that the defendant be, and he is, hereby v.  
 "dismissed, and that plaintiff do pay to the said defendant the costs HUSSEY.  
 "of this suit, when taxed and ascertained."

The costs were furnished at same time as the order, amounting to £356. 2s. 4d., which were the entire costs the defendant was entitled to, instead of the costs of the day, as in the case of a record withdrawn. The affidavit to ground the motion stated these several facts, and that it was solely owing to the existence of the temporary bars that the record was withdrawn; that he would go to trial next Assizes, and that the property involved was of considerable value, viz., £500 a-year.

*Martley and Leahy, contra.*

We are here in support of a legal order of the Court, strictly following the 106th section of the Procedure Act (1853):—"The plaintiff shall proceed to trial within three Terms from that in which, or the Vacation of which, the defence or other subsequent pleading is filed; and in default thereof, the defendant may enter a rule that the plaintiff do proceed to trial at the Assizes or Sittings next after the expiration of twenty days from the service of such rule; and that in default, the defendant shall be dismissed, with his costs of the suit: and if the plaintiff neglects to proceed to trial in pursuance thereof, the defendant, on filing an affidavit of the service of such rule, and that the plaintiff has failed to proceed to trial in pursuance thereof, may enter a peremptory order for the payment of his costs of the suit, which order shall be in lieu and shall have the effect of a judgment as in case of nonsuit." The want of forethought in a party is no justification for setting aside a legal order; and in the notice of motion, the plaintiff has not, in pursuance of the 131st General Order (1854), stated the grounds of his application: *Gillman v. Connor* (a). A cause petition is out of Court if not moved

(a) 1 Ir. Law Rep. 346.

E. T. 1856. within three Terms after its filing: *Cassan v. Carr* (a). It  
*Queen's Bench* appear that justice would be defeated if the Court refused  
 DOWELL application to restore it.  
 v.  
 HUSSEY.

*Macdonogh* replied.

The plaintiff was guilty of no *laches*—nothing but a fair  
 happened, by reason of the clerk mislaying the order served.  
 plaintiff had to meet the outstanding lease, and that in his  
 he could not go to trial. Where the plaintiff has not been  
 actual default, or if defendant have caused the delay, the Court  
 will interfere, and set aside or vary orders obtained as in  
*Rutledge v. Rutledge* (b). There the plaintiff was obliged to  
 a bill to compel the defendant to waive temporary bars in  
 ejectment: and in *Doe d. Ringer v. Blois* (c), it was held as  
 a sufficient excuse for not bringing the case to a trial, that, since joint  
 issue in the cause, unexpected difficulties had arisen in procuring  
 the necessary evidence to entitle the plaintiff to a verdict.

LEFROY, C. J.

Admittedly, the rules entered by the defendant were perfectly  
 regular—one, a rule fairly apprising the plaintiff that if he could  
 show any reason against it, he could come in and apply to the  
 Court to extend the time for his proceedings in the action. If  
 the plaintiff took no step to set it aside; he allows that preliminary  
 rule to stand, and on the 11th of April the second rule was made  
 and judgment entered as in case of a nonsuit. We would not  
 do great injustice to suitors if we allowed the rules of the  
 Court to be dispensed with. This 106th section of the Procedure  
 Act is a salutary enactment to protect a party against the oppression  
 of having a claim hanging over his possession and title  
 for an unreasonable length of time. But it is said we are to  
 deprive the defendant of the two regular rules made, on the ground  
 of discretion, and to obviate a hardship which would otherwise  
 result from the Court enforcing its rules in particular cases. The

(a) 2 Ir. Ch. Rep. 577.

(b) 3 Ir. Law Rep. 102.

(c) 8 Dowl. P. Cas. 18.

existence of the temporary bars was known to the plaintiff's attorney—every fact known that he now relies on for dispensing with the rules, and so this case must be decided as other cases. Every suitor is entitled to the benefit and protection of the rules of the Court, and nothing can prevent the operation of these rules, except a fatality. None such existed here, and therefore the motion must be refused, with costs.

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CRAMPTON, J.

There never was a plainer case for the refusal of a motion. The notice of motion does not even state the grounds on which the application is rested, because, if such were stated, the notice could be *felo de se*. It is grounded on the *laches* of the attorney—surprise or fatality suggested, and yet we are called on to set aside two regular orders of the Court. If the Statute of Limitations were in the way, possibly the Court might interfere.

MOORE, J., concurred.

Motion refused, with costs.

#### DOOLAN v. REYNOLDS.

April 28.

CLARKE, on behalf of W. Worrall, assignee of the estate and executor of the defendant, moved that the charging order, bearing date the 11th of June 1855, be rescinded, and the judgment on which same was founded be set aside, inasmuch as no judgment

A judgment was entered on the 11th of May 1855, in this Court, on a bond, dated the 31st of October 1854,

the warrant executed contemporaneously therewith, being filed in the Court of Exchequer; and a charging order, founded on the judgment, was obtained on the 11th of June 1855.—*Held*, on an application by the assignee of the defendant, an insolvent debtor, to set such aside, that though such judgment was void as against the assignee, because it was not entered within twenty-one days after the date of the bond and warrant, and was entered in a Court different from that in which the warrant had been filed, and because of the defeasance not being written on the same paper as the warrant of attorney, yet the Court would not set aside such proceedings because of matter *ex post facto*, such as an insolvency occurring after the judgment and order were obtained.

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was entered on the bond and warrant of the said defendant twenty-one days after the date of said bond and warrant. No warrant, or copy thereof, was filed in this Court within the period aforesaid by the plaintiff, as required by the statute as the condition upon which the said bond and warrant were executed, and bearing equal date therewith, was not indeed filed in this Court, as required by the statute, previously to filing the same on the 11th of May 1855, when said judgment was entered, and also because plaintiff did not inform the Court, on the date of said charging order, of the fact of a certain assignment of the estate so charged, to one George Hassard, and of which fact plaintiff was apprised by notice of the 5th of June 1855; and also because the defendant had not, on the 11th of June 1855, such estate interest in the fund so charged as came within the provision of the Common Law Procedure Act. A fund to which the plaintiff was entitled was in the Incumbered Estates Court, and the charging order in question bound that fund; the owner of this fund becoming insolvent after the charging order was obtained on the date of the above judgment.

The bond and warrant bore date the 31st of October 1854; on the 7th of November 1854, a copy of the warrant was filed in the Court of Exchequer; and on the 11th of May 1855, judgment was entered thereon by mistake in this Court, and on the 11th of June 1855 the charging order was obtained. This judgment was entirely valueless, because it does not comply with the provision of 3 & 4 Vic., c. 105, s. 12, which enacts that "Every writ of attorney to confess judgment in any personal action, or a copy thereof and of the attestation thereof, and the defence and indorsement thereon (if any), shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, by the proper officer, in the Court in which judgment upon the warrant of attorney shall thereafter be entered." Here the warrant was not filed in this Court within the twenty-one days, nor was it filed in the proper Court, having been filed in the Court of Exchequer, although the judgment was obtained in the Queen's Bench.

ench. Further, the defeasance was not written on the same paper as the warrant of attorney; the warrant, therefore, is null and void, according to the provisions of the 14th section of 3 & 4 Vic.,

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105.\* This judgment is therefore invalid against the general creditors of the insolvent, and ought to be set aside, and also the charging order founded thereon.

*Exham* and *Dowse*, contra.

This judgment, although not entered in the Court in which the copy of the warrant was filed, is not void as against all persons, but only against two classes of persons, namely, the assignees in bankruptcy and insolvency; but as against the original conusor of the judgment, and those claiming through him, it is good. The 3 G. 4, c. 39, s. 3 (*Eng.*), renders a judgment like this void against assignees of a bankrupt; and by 7 G. 4, c. 57, the provisions of the 3 G. 4, were extended to the assignees of an insolvent; and there are analogous provisions in the 3 & 4 Vic., c. 105, on which this motion is founded: *Morris v. Mellin (a)*. It was there held, under the 3 G. 4, that a warrant of attorney, subject to a defeasance not written on the same paper and parchment, was not void against the assignee of an insolvent. The judgment must stand here, though it may be ineffectual against the assignees. But further, by the Common Law Procedure Act, no power is given to this Court to repeal a charging order regularly obtained.—[LEFROY, C. J. How can we be called upon to try conflicting rights to this fund?]—Here there has been no misleading of the Court, or suppression. The invalidity of the charging order on the ground of the assignment to Hassard was not pressed, the Court having intimated that it was not tenable.

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\* 3 & 4 Vic., c. 105, s. 14—"And be it enacted, that if such warrant of attorney shall be given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper on which such warrant of attorney shall be written, before the time when the same, or a copy thereof respectively, shall be filed, otherwise such warrant of attorney shall be null and void to all intents and purposes."

(a) 6 B. & C. 446.



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*O'Moore* was heard in reply.

LEFROY, C. J.—We cannot interfere with this charging order or set aside this judgment. Is there any case under the statute of *Elizabeth* where a judgment is declared fraudulent void, where, on the application of a particular creditor, a judgment was set aside as against that particular creditor? what is to prevent a dozen charging orders?

*O'Moore*.—This operates as an absolute assignment, and is allowed to stand, would work injustice. The warrant of attachment is null and void, and how can a judgment be allowed to stand on a void warrant? The charging order has never been an absolute.

LEFROY, C. J.

We cannot interfere with this charging order, or the judgment upon which it is founded. There is no case in which a charging order has been set aside on grounds like the present. It may be annulled by the operation of the Act of Parliament; but that is a question which can only arise when the fund comes to be distributed by the Incumbered Estates Court, which now has the distribution of it; but we cannot disturb the proceedings on account of a matter which has taken place subsequent thereto. Here, the insolvency of the person against whom the judgment was entered. If this were the case of a fund in the Sheriff's hands who had claims to deal with under conflicting executions, the Court might have to intervene; but such is not the case now before us. It is for the Incumbered Estates Court to decide this question. The judgment and charging order are, both of them, regular, and we have no power to make a ruling on the subject; and the fact of the judgment being void in a particular case does not give us the power to set aside a regular charging order founded thereon. The course for the assignee to adopt is to seek to recover from this creditor the money paid on foot of the judgment and charging order, or prevent him from being paid in the Incumbered Estates Court, by showing what he has shown us here.

CRAMPTON, J.\*

I concur with my LORD CHIEF JUSTICE. It is impossible for us to set aside a perfectly valid order, made on foot of a judgment regularly entered up, by reason of matter *ex post facto*, such as solvency occurring after the order is regularly obtained, although it may be bad as against a particular party. I can conceive a case to occur where an execution has issued at the suit of a creditor, and a question has arisen between that creditor and the assignee of the insolvent, as to which of the parties should get the proceeds. That is not the question here, but it is whether we are to set aside, by matter *ex post facto*, an existing judgment regularly entered, and the order obtained thereon?

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v.

REYNOLDS.

Motion refused, with costs.

\* PERRIN, J., and MOORE, J., were absent.

#### TOTTENHAM v. GOFF.

April 30.

TEMPHILL showed cause against a conditional order directing that the defendant be at liberty to lodge in Court, to the credit of this cause, the sum of £320, and thereupon that the issuing of the *habere* in this case be stayed. This order had been obtained on behalf of the defendant, on an affidavit stating that the action had been brought for two years' rent, and on the trial the jury found that the rent in arrear amounted to £300.

The action in this case was brought for non-payment of rent, and on the trial of the case the plaintiff recovered a verdict for the rent then due; and the defendant seeks now to stay the issuing of the *habere*, on the payment of the rent then due, although since the finding of the verdict another half-year's rent has fallen due. The plaintiff is clearly entitled to his writ of *habere*, unless all rent due up to the executing the writ be paid. The defendant would

The Court will not stay execution on a *habere* obtained in an action of ejectment for non-payment of rent, unless all rent due at the time of the issuing of the *habere* be paid to the plaintiff.

E. T. 1856. not be entitled to redeem in a Court of Equity until all arrear was paid: *Taylor v. The Ejector* (a). By 9 & 10 Vic. c. 111, s. 3, it is provided that if the tenant shall, before the writ of execution be executed, pay all rent and arrears of rent then due, all further proceedings shall cease; the rent there referred to shall mean all rent due at the time of the tender, and not the rent for which the ejectment was brought.

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*Harris*, contra, for the defendant.

In *Taylor v. Ejector*, the judgment was had by default; and statute 9 & 10 Vic., c. 111, does not apply to a case where a verdict is found and the amount of rent ascertained by the jury.

CHAMPTON, J.\*

The fact of the judgment being had by default can make no difference. The defendant must bring in all the rent due, else the writ must be discharged.

*Per Curiam.*

Let the defendant, within three weeks from this day, pay to the plaintiff the sum of £544, being the amount of rent due, together with the sum of £4, as and for the costs of this motion; and thereupon let the plaintiff be restrained from issuing any writ of *habere*, or other execution in this cause, for the amount of said rent; and in default of such payment within said period, then let the writ be discharged with costs; and let the plaintiff be at liberty to proceed as he may be advised.

(a) 1 Ir. Com. Law Rep. 27.

\* *Solus.*

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*Queen's Bench*

Ex parte RICHARD HENN;

In the matter of a Presentment for the County of Clare.

June 2.

MARTLEY (with him *T. R. Henn*) moved to make absolute a conditional order for a *certiorari*, to bring into this Court a presentment made by the grand jury of the county of Clare for a new line of road, with a view to having it quashed. It appeared by the affidavits that the application for this presentment was made at the Road Sessions in October 1854; at the Spring Assizes of 1855 it was certified by the grand jury; at the May Presentment Sessions it was again brought forward, with the plans and specifications for approval; and at the ensuing Summer Assizes the presentment was passed by the grand jury and stated by the Judge; and that until the presentment was stated, Richard Henn, an owner of a portion of the land through which the road was intended to pass, had no notice of it, nor had the occupiers been served with any notice of an intention of an application for this road.—[CRAMPTON, J. Is there error on the face of this presentment? for if there be not, this Court cannot quash the proceedings.]—The Court will quash the proceedings, if it be shown by affidavit that the tribunal before which they were had had no jurisdiction; but where an Inferior Court has jurisdiction, this Court will not interfere, except for transparent error: *Rex v. Inhabitants of Great Marlow* (a); *The Queen v. The Aberdare Canal Company* (b); *Cripps v. Durden* (c). The 6 & 7 W. 4, c. 116, s. 55, provides that no presentment shall be made for laying out any new road, unless a notice, setting forth that an application is intended to be made for a presentment, has been personally served upon or left at the house of each occupier of the land through which such new road is intended to be made,

Where a presentment has been passed by a grand jury, and stated by a Judge, this Court will not grant a *certiorari* to quash this presentment, on the ground of informality in the obtaining of the presentment.

As a general rule, the Court will not go behind a presentment.

(a) 2 East, 244.

(b) 14 Q. B. 854.

(c) 1 S. L. C. 378.

**E. T. 1856.** fifteen days at least before the day of holding the Session.  
*Queen's Bench* none of the notices required by this section have been served on the presentment is void. True, it does not require that the presentment in fee should be served with notice, but he is entitled to traverse on the non-service of the occupiers; for the Legislature has made notice to them essential, the presumption is that a supposed notice to them would reach the landlord. Great injury will result in this case to the owner, if the Court do not make this order; he cannot traverse for damages, because, before traverse can be entertained, it must have been lodged before the presentment was filed, which could not have been done by Mr. Henn, because he was in entire ignorance of the land taken for the road: *The King v. The Justices of Somersetshire*; *The Queen v. Bolton (b)*; *The Queen v. Cheltenham Commissioners (c)*.

*Ex parte*  
**HENN.**

*J. Clarke* and *C. Barry* appeared on behalf of the contractor and grand jury.

The contractor has been allowed to go on expending his money in furtherance of his contract, and Mr. Henn took no steps to set aside this presentment until some £500 or £600 had been expended. The application for the road was made at the Presentment Session of October 1854; at the Spring Assizes of 1855 it was certified to the grand jury. At the May Presentment Sessions it was brought before them, with the plans and specifications for approval, and at the Summer Assizes the presentment was passed by the grand jury, and filed by the Judge. It is not until August 1856 that Mr. Henn gives notice of his intention to traverse for damages in the very month that the contractor received notice of the presentment having been filed, and desiring him to proceed with his contract; which having done, and up to March 1856 he has expended £600, then Mr. Henn apprises him he will traverse for damages. No cautionary notice was served on the contractor before the grand jury; no application was made to this Court in Mich-

(a) 1 Q. B. 66.

(b) 1 Q. B. 467.

(c) 5 B. & C. 816.

mas Term 1855 for a *certiorari*; but his traverse being entered, heard and disallowed, the legality of the presentment was thereby admitted. There is no necessity for serving notice of a presentment upon the landlord, it is only requisite to serve it on the tenant or occupier: 17th & 55th sections of Grand Jury Act, 6 & 7 W. 4, c. 116. Besides, the first Presentment Sessions was the proper tribunal to examine into and dispose of any question relating to the service of notice. The traverse for damages admits the legality of the presentment: *The Queen v. McKay* (a). This Court will not accede to the application for a *certiorari* after all that has been done—after the contractor entering into a recognizance for the execution of the work—after having spent his money on the faith of the presentment, and where there has been no *laches* on his part, or on that of the grand jury. But even if grounds were laid for a *certiorari*, it is a matter of discretion with the Court to grant the writ; and under the circumstances detailed in the affidavits here, the proper exercise of discretion will be to refuse the writ: *The Queen v. The Manchester and Leeds Railway Co.* (b).

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*Henn* replied.

It would be a great wrong that a man's property should be taken from him without giving him an opportunity of seeking compensation; and yet here is a presentment passed, and no notice ever given to Mr. Henn until it was filed. The Court will allow evidence of defect of jurisdiction to be laid before it: *The King v. St. James', Westminster* (c); *The King v. Justices of Somersetshire* (d); *The King v. Justices of West Riding* (e).

LEFROY, C. J.

In this case a very important question has been raised, respecting the right of the Court to go behind the presentment, and examine whether all the preliminaries giving the grand jury jurisdiction were complied with. It is said that everything done may be shown

(a) 2 Ir. Law Rep. 16.

(b) 8 A. & E. 413.

(c) 2 A. & E. 241.

(d) 5 B. & C. 816.

(e) 5 T. R. 629.

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to be null and void, *ab initio*; that the Presentment Sessions have not done their duty; that the grand jury have not done their duty; nay, that the Judge himself has not done his duty; and after the presentment has passed all these tribunals, it is to be re-opened, and the things done under it set aside. If that does not hold good, I do not know who will ever undertake a case like this, if, after he have expended his money, he is to be deprived of the benefit of that outlay, and all the proceedings to levy the money be avoided. I know nothing more likely to produce litigation.

The question here arises as to the jurisdiction of the magistrates at Road Sessions. It is said that this is but a conditional jurisdiction, and that the magistrate had no jurisdiction to enter upon a matter brought before them in this case until certain notices had been served. There is another question, whether, in the exercise of the jurisdiction, the grand jury should proceed by a certain course, or ascertain if all preliminary matters were attended to, and when these should now be made subject of discussion, and all the magistrates did considered null and void?

If it were necessary, to found the jurisdiction, that this conditional precedent should be complied with, without which the magistrates could not make the order, is it not to be presumed that the grand jury did their duty, and inquired as to its being complied with? Is it to be presumed that in the exercise of the authority vested in them they neglected that duty? What evidence is there to rebut that presumption? evidence of hearsay and belief. But further, Mr. Henn had no right to be served with these notices; he was neither occupier nor tenant. If the Legislature have thought fit to say that a notice on the occupier shall be sufficient, the landlord cannot say that his rights have not been provided for; it may be a hard measure of legislation, but the Court cannot help that; he has no right therefore to upset all that has been done as required by the Legislature. The presentment having gone before the grand jury, who are to ascertain certain matters requisite for them to inquire into, are we to presume that they did not do so? Or do we have the Judge's fiat of this presentment. Are we to presume, too, that he did not inquire into the necessary requirements before

ating, before he sanctioned by a final judgment all these antecedent proceedings? Are we to presume that all these tribunals have isolated their duty, and that all this expenditure on this road is to be jeopardised by an inquiry at this late period? It would be enough to justify the refusal of this application, by saying that it was the negligence of Mr. Henn which creates his difficulty. Had he proceeded in time, he might have prevented all that has taken place; his own conduct was an encouragement to the contractor to go on; he enters a traverse, not on the ground that the proceedings were a nullity, but for damages: he had notice, and he does not give intimation to the contractor until a heavy expense had been incurred. The grand jury only took into their consideration the damages; and if now Mr. Henn were to be heard, it would have the effect of producing great inconvenience and mischief. Under these circumstances we follow the case of *In re Quin* (a), which, although not precisely similar, yet the Court in that case acted on the general rule that they would not go behind the presentment: if it acted otherwise, the inconvenience would be enormous. We therefore are of opinion that this order ought not to be made absolute.

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HENN.

CRAMPTON, J.

The practice in a case like the present is now fully settled—a practice not founded on the mere opinion of a Judge, but growing out of the Act of Parliament upon which we are called to pronounce an opinion. In the first place it is alleged that this presentment is null and void from the beginning, and that it operates with unreasonable hardship on Mr. Henn; but the Court cannot help that.

But as to the general jurisdiction, the cases in England all establish the position now well settled—if an inferior tribunal has general jurisdiction of a matter, whatever mistakes that tribunal makes, this Court will not hold an inquiry into them; but if they have no jurisdiction to entertain the subject-matter, then this Court will interfere on affidavits brought before it. This present-

(a) 9 Ir. Law Rep. 160.



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ment is not null and void. The enactments of the 55th section of 6 & 7 Vic., c. 116, are directory; the serving of the notices is not a condition precedent, but a direction, which ought to be obeyed by the parties to whom the direction is given.

Acceding then, as I do, to the doctrine that this Court cannot go behind the presentment, Mr. Henn has made no case for our interference. The 55th section directs notice to be served on all occupiers; and the inhabitants of the houses must be consenting parties, but the owner of a property, not resident, is not entitled to notice.

Cause allowed, with costs.

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GOOD v. ALLEN.

*May 1.*

Where, pending a motion to set aside a defence for irregularity, a plea of confession is filed, the plaintiff is entitled, notwithstanding such plea of confession, to move his motion, otherwise he will be disentitled to the costs incurred by him in such a proceeding.

WARREN, on behalf of the plaintiff, moved that the defence filed in this cause, on the 22nd of April 1856, be set aside for irregularity, inasmuch as the particulars of the alleged payment in said defence mentioned were not indorsed thereon; and that the plaintiff be at liberty to mark judgment for want of a plea. Since the service of this notice of motion, a plea of confession has been given; it is necessary however that this motion should be moved, otherwise the plaintiff will not be allowed to tax the costs of those interlocutory proceedings against the defendant.

*Bastable, contra.*

Motion granted, with costs.

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*Queen's Bench*

## TURNER v. M'AULEY.\*

Nov. 25.

T. WHITE, on behalf of the defendant, had on a former day obtained an order *nisi* for liberty to file the following defences: first, the statutory defence, traversing the plaintiff's right to the possession of the lands and premises in the ejectment in this case; and secondly, a defence on equitable grounds, relying upon an agreement in writing, whereby one Christopher Abbott and the plaintiff agreed to let the lands mentioned in the ejectment, together with certain other lands, to the defendant, from the 9th day of September 1851, for a term of years yet unexpired, at the yearly rent of £22, which agreement was signed by the agent of Christopher Abbott and the plaintiff and defendant.

In an ejectment on the title—*Held*, under the 85th section of the Common Law Procedure Amendment Act 1856, that the defendant may, by leave of the Court, plead the statutory and an equitable defence.

*B. Stephens* showed cause against this conditional order.

The 85th section of the Common Law Procedure Amendment Act 1856 authorises a defendant in any action, in any of the Superior Courts, in which, if judgment were obtained he would be entitled to relief against such judgment on equitable grounds, to plead the facts entitling him to such relief; that section does not apply to ejectments on the title. The word "action," used therein, is only applicable to personal actions, as contradistinguished from actions of ejectment, and is so confined by the interpretation clause of the first Procedure Act.—[CRAMPTON, J. The 70th section of the late Act, allowing the granting of a mandamus in any action, excepts ejectment and replevin; it would seem therefore that the word "action," in the 85th section, would equally apply to ejectments as other actions.]—If this provision of the statute were intended to apply to ejectments and replevin, special provisions would have been introduced into the 85th section, applicable to such form of action. *Neave v. Avery (a)* decides that such a defence cannot be pleaded

(a) 16 C. B. 328; S. C. 24 L. J. 207, C. P.

\* LERROY, C. J., *absente*.

M. T. 1856. under the analogous section of the English Act. But it may be  
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 M'AULEY. said that this case was decided on the practice in England, as there,  
 in ejectment, there is no plea, all pleadings in such action being  
 abolished by the 168th section of the English Act, and a new form  
 of proceeding substituted therefor. But there is no substantial  
 distinction between a plea and the special defence there used. If  
 a plea of this description be allowed, no valid replication could be  
 pleaded; as the plea sought to be pleaded raises the question,  
 whether the defendant would be entitled to a decree for specific  
 performance of the agreement stated? Such a judgment could never  
 be made available in a Court of Law.

*T. White, contra.*

The 85th section is as applicable to ejectments as to other actions;  
 and in several sections of the statute, the word "action" appears to  
 be used as including the action of ejectment; for instance, the 31st  
 section allows a certified copy of a will to be given in evidence in  
 "any action at law;" that must include ejectments; so also, in the  
 22nd section of the first Act, providing a remedy in case of dis-  
 abilities arising from infancy, marriage or otherwise, and the 28th  
 section, allowing renewals of writs of summons to save the Statute  
 of Limitations. *Neave v. Avery* was decided on the ground that all  
 pleadings in ejectment in England were done away with; but it is  
 different in this country, separate defences being allowed in both  
 forms of action of ejectment. A plea may be pleaded in ejectment  
 for non-payment of rent, and there is no reason for drawing a dis-  
 tinction between ejectment on the title and non-payment of rent.

CRAMPTON, J.

Upon this question we have no difficulty. The Common Law Pro-  
 cedure Amendment Act 1856 has given the defendant, *in any action*,  
 liberty to plead an equitable defence of a particular kind; the 85th  
 section says:—"It shall be lawful for the defendant in any action,  
 "and for the plaintiff in any action for replevin of goods, in any  
 "of the Superior Courts, in which, if judgment were obtained, he  
 "would be entitled to relief against such judgment on equitable  
 "grounds, to plead the facts which entitle him to such relief."

A case decided on the English Procedure Act has been relied on, showing that, under that Act, such a defence could not be pleaded; but the difference between the rules of pleading in the two countries shows plainly why this defence should be allowed here, and not in England. In the case cited, of *Neave v. Avery*, the ground relied on was, that in ejectment no plea at all was allowed; and upon that established practice in England the case was decided. Here the practice is quite otherwise; for a defendant who takes defence is bound to come in and put on the file a defence in the form given by the statute: the distinction is therefore plain; here the defendant is, under the Procedure Act, bound to plead, but in England he is not so bound; that case, therefore, does not govern the case before us, and we must decide on the terms of the Act itself.

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In the first Common Law Procedure Act, ejectment is not classed with personal actions; but the Act specially distinguishes "actions of ejectment," though certainly in the interpretation clause it seems to be classed as a personal action. Now I do not mean to decide whether, in the first Act, ejectments were comprised in the word "action," but there can be no doubt that under the latter Act it is included. We must read both Acts together; and if there be any inconsistency or conflict between them, the older Act must give way to the more recent one. There is no doubt that, in some of the sections of the recent statute, the words "ejectments" and "actions" are classed together; and the arbitration clauses show that ejectment must be included under the head of actions; for surely it was not intended to exclude ejectment cases from the benefit of those provisions. The comprehensive term "action" is not therefore limited by the term "personal action," used in the former Act.

Further, the Legislature must, I think, in framing the Act, have had in contemplation actions of ejectment, as actions in which equitable defences should be permitted, since there is no class of cases to which equitable defences are more applicable than ejectments. Parties frequently encountered difficulties in asserting their rights, because of the legal title not being in them, and consequently were obliged to have recourse to a Court of Equity to enforce those

**E. T. 1857.** rights; and the 87th section provides for that very case, that where  
*Queen's Bench* a party is entitled to relief on equitable rights, the opposite party  
**TURNER** may reply facts which avoid such pleadings upon equitable grounds.  
**v.**  
**M'AULEY.**

It is said there is no section in the first Act giving a replication in an ejectment; it would be absurd if there was, as a common form of defence is there given, and equitable defences were not then contemplated.

We therefore are of opinion that in a proper case the defendant may put in an equitable defence. I see no inconsistency between an equitable defence and the statutory one. If a man enter into possession under an equitable agreement, he would, under that agreement, be at law a tenant from year to year, and would have a good defence under it, if no notice to quit had been served on him; but he might also have another defence not inconsistent with this. We are therefore of opinion that a party, showing just grounds for it, ought to be allowed to plead an equitable defence in an action of ejectment. This order, therefore, must be made absolute, but as the case is a novel one we will give no costs.

April 28.

May 6.

The defendant pleaded first the statutory defence and the following:—

To an action of ejectment on the title, brought in 1856, the defendant pleaded (by leave of the Court) an agreement for a lease, signed by the plaintiff, and dated in 1851; the lease was to contain a special clause of surrender, and to be in a certain specified form. The plea did not aver possession of the premises, or payment of rent by the defendant under the agreement. On demurrer, *Held*, that the equitable defence pleaded was no answer to the action.

"And for defence upon equitable grounds, by leave of the Court, for so much of said lands and premises as the preceding defence applies to, the said Christopher M'Auley saith that said plaintiff is not entitled to the possession of said lands and premises for which this defendant now takes defence; for the said Christopher M'Auley saith, that by a certain memorandum, in

*Held also*, that the objection to the plea was rightly taken by demurrer.

*Semle.*—The principle upon which it has been held that an equitable defence cannot be pleaded, under the English Common Law Procedure Act 1854, does not apply to the Common Law Procedure Amendment Act (Ireland) 1856, a plea in ejectment having always been allowed in Ireland.

*Semle.*—The equitable defence contemplated by the 85th section of the Irish Act must show such a state of facts as in Equity would entitle the defendant to a perpetual injunction, unlogged by any condition, and terminating all controversy between the parties on the point in question.

“ writing, bearing date the 18th day of September 1851, and made  
“ and entered into by and between the said Christopher M'Auley  
“ and one Christopher Abbott and said plaintiff, and which said  
“ memorandum was, on said last-mentioned day, signed by the said  
“ Christopher M'Auley and one John Abbott, then the agent, and  
“ acting under power of attorney from the said Christopher Abbott,  
“ for and on the part of the said Christopher Abbott, and also  
“ by said plaintiff and Christopher Abbott; and the said plaintiff  
“ agreed to let by lease to this defendant, Christopher M'Auley,  
“ the holding—[describing the premises]—for the term of 999  
“ years, from the 29th day of September 1851, with clause of  
“ surrender every three years, at the yearly rent of £22: and  
“ by said memorandum it was further agreed by and between  
“ the said Christopher Abbott, the said plaintiff, and the said  
“ Christopher M'Auley, that said lease should be the common  
“ printed form in general use; and that he, said Christopher  
“ M'Auley, should pay into the hands of one John Hazlett, soli-  
“ citor, the sum of £22 for the use of the said Christopher Abbott;  
“ but the payment of the said sum of £22 was not to be a condition  
“ precedent to the said Christopher M'Auley obtaining said lease.”  
It then averred, “ That the lands and premises for which the  
“ defendant took defence were portions of the lands and premises  
“ comprised in said memorandum; and that upon the occasion  
“ of the making and signing of said memorandum, Christopher  
“ M'Auley did pay into the hands of the said John Hazlett, who  
“ was then acting as solicitor of the said plaintiff, the sum of £22,  
“ in pursuance of said agreement contained in said memorandum,  
“ and on account of said sum of £22, which he agreed to pay  
“ as aforesaid; and that at the same time of the making and  
“ signing of said memorandum, said Christopher Abbott had a  
“ sufficient estate in said lands and premises to enable him to  
“ grant said lease for 999 years to this defendant said Christopher  
“ M'Auley, with the concurrence of said plaintiff, who then had  
“ some estate or interest in said lands and premises in said memo-  
“ randum mentioned, and who has since acquired, by mesne  
“ assignment or otherwise, the said estate or interest of the said

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E. T. 1857. "Christopher Abbott in said lands and premises, subject to said  
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 M'AULEY. "agreement. That the agreement contained in said memorandum  
 "is still a valid and subsisting agreement, and is not altered, re-  
 "leased, discharged, surrendered, set aside or invalidated ; and that  
 "by virtue thereof, he, the said Christopher M'Auley, acquired an  
 "equitable estate in the said lands and premises comprised in said  
 "memorandum, for the full term of 999 years, from the said 29th  
 "day of September 1851 ; and which term is still subsisting and  
 "unexpired."

To this equitable defence the plaintiff demurred, assigning the following reasons:—That the defence did not contain an averment of a tender of a lease, or of a counterpart, pursuant to the agreement ; or that the plaintiff or Abbott were ever required to execute a lease ; or that defendant was ready and willing to execute a lease ; or that defendant ever paid, or was ready and willing to pay, the rent mentioned, or any part thereof ; or that possession was taken under the agreement ; or that defendant ever offered to perform his part of the agreement, save by the payment of the said sum of £22. That it contained no admission that the defendant had no defence at Law, or a waiver of such defence, and that equitable defences were only allowed in lieu of, and not in addition to, legal defences. That it would be discretionary with a Court of Equity to restrain execution on any judgment, and not a case for perpetual or unconditional injunction. That no Court of Equity would interfere in favour of the defendant, save on the terms of the defendant executing a lease, and paying up all rent due—terms which a Court of Law has no power or means of enforcing ; and that no Court of Equity would specifically perform such agreement, in consequence of the *laches* of the defendant.

*B. Stephens*, in support of the demurrer.

The agreement for a lease pleaded in this action has never been executed, it is therefore no defence to the plaintiff's ejectment ; but even if the Court should be against me on this point, this defence is, on other grounds, no bar to the action ; there is no

avowment of possession under the agreement, or that a requisition to execute a lease was made to the plaintiff or C. Abbott, or that rent was paid or tendered under this agreement, or that the defendant was or is ready and willing to perform the agreement on his part; moreover, this agreement is dated in 1851, and the defence does not explain why the defendant slept so long upon his claim.—[CRAMPTON, J. There has been no refusal on the part of the plaintiff; would such an agreement, where nothing has been done under it, be deemed in Equity a bar to the plaintiff's right of action?—It is submitted that it would not; a bill for specific performance, setting out this agreement, without anything further, would be demurrable. The Common Law Procedure Amendment Act (Ireland) 1856, ss. 85, 86, 87, was not intended to confer the powers of a Court of Equity on the Common Law Courts; its object is to enable them to receive defences on equitable grounds, and if, in their opinion, the facts pleaded would, in Equity, be such an answer to the case of the plaintiff as to entitle the defendant to an unconditional and perpetual injunction, then they are to give their Common Law judgment accordingly in favour of the defendant; but they are not empowered to give such a decree as might be obtained in a Court of Equity.—[CRAMPTON, J. Does this Act give to the Superior Courts a jurisdiction in equitable defences analogous in principle to that given to the Civil-bill Court?—No; the Civil-bill Court is, for some purposes, a Court of Equity as well as a Court of Law; but in the Superior Courts only a Common Law judgment can be given; no conditions can be imposed. This equitable defence amounts in substance to a bill for specific performance, and the defendant should at least plead everything which would entitle him to maintain such a bill in Equity; he has not performed his part of the agreement, and he must not only show that he was in no default in not having performed it, but he must also allege that he is still ready to perform it: 1 *Fonb. Eq.*, p. 391, *note d*, 5th ed.; *Milward v. Earl of Thanet* (a). He must also show that he has taken all proper steps towards the performance on his part: *Story Eq. Jur.*, s. 771, 5th ed. Nothing has been done under this agreement

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(a) 5 Ves. 720, n. 52.



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for several years; and where, in such a case, a lessee seeks to enforce an agreement, he must, by his pleading, account for his delay: *Heaphy v. Hill* (a); *Sug. Ven. & Pur.*, c. 6, s. 2, p. 219, 13th ed. This defence does not explain the delay, and therefore, as it would not have assisted the defendant in Equity, it cannot prevail at Law; besides, Equity would not interfere in favour of the defendant, except on certain conditions, such as his executing a lease, and paying up all rent due; and the Courts of Common Law have refused in such cases to allow an equitable defence to be pleaded: *Mines Royal Societies v. Magnay* (b); *Gorely v. Gorely* (c). Another principle is, that the case must be one in which complete and final justice can be done, so that the judgment of the Court of Law would be equivalent not only to an unconditional but also to a perpetual injunction, and so terminate all litigation upon the matters in dispute between the parties: *Clerk v. Laurie* (d); *Wood v. Copper Miners Company* (e); *Gulliver v. Gulliver* (f); *Wodehouse v. Farebrother* (g). Lastly, it is questionable whether an equitable defence can be pleaded in ejectment: *Neave v. Avery* (h). We have on the record a ground going to that point, but do not intend to argue it here, in deference to the decision of this Court on the motion for liberty to plead this defence. It is, however, submitted that the principle decided by *Neave v. Avery* is applicable to this country, because here, in ejectment on the title, the common defence is not a plea.

*T. White* (with him *Morris*), contra.

If this agreement does not afford ground for an equitable defence, what equitable defence can be pleaded in ejectment? The grounds of demurrer relied on are two-fold, those relating to the form of the defence, and those relating to the matter of it. As to the

(a) 2 S. & St. 29.

(b) 10 Ex. 489; S. C., 18 Jur. 1028.

(c) 1 H. & N. 144.

(d) 1 H. & N. 452.

(e) 17 C. B. 561.

(f) 1 H. & N. 175; S. C., 2 Jur., N. S., 1051.

(g) 5 EL. & B. 277; S. C., 2 Jur., N. S., 998.

(h) 16 C. B. 328.

form, it is objected that it does not contain the necessary averments; that there is no averment of possession, or payment or tender of rent by the defendant, under the agreement, or of a tender of a lease, or of readiness to execute it; and, lastly, *laches* is imputed; but demurrer is not the proper mode of objecting to this plea; the plaintiff should have applied to the Court to strike it off the file: *Considine v. Tubbledy* (a). The averment of possession is not necessary where a written agreement, signed by the party to be bound by it, is relied on, because it is within the protection of the Statute of Frauds, and is binding *per se*; it is only when the agreement is verbal, or reduced to writing but not signed by the party to be bound by it, that possession is part of the case of a plaintiff in Equity, and it must be averred in such case, to take it out of the operation of the Statute of Frauds. However, if it were necessary, there is a sufficient averment of possession in the allegation that the premises for which defence was taken are comprised in the agreement, by virtue of which the plaintiff alleges he has an equitable estate for 999 years. As to the non-averment of a tender of the rent, there is nothing on the pleadings to show that any rent is due; "readiness and willingness to pay," not being a fact in the case, is not required to be pleaded under the 85th section of the Common Law Procedure Amendment Act. The averment of "tender of a lease" and "readiness to execute" is mere matter of form in a bill to charge the defendant with the costs; and *laches* cannot be presumed. A case of *laches*, if it existed, should have been raised by replication, in which the plaintiff might have denied the title of the defendant to equitable relief.

As to the matter of the defence, it is objected generally that the defence is bad, because the agreement relied on is executory. The authorities cited in support of this objection are all cases in which special equities existed, to prevent a Court of Common Law pronouncing judgment; while, in this case, there are no intricate equities to be settled, and consequently no question to be adjudicated on, but the simple one of the right to the possession.

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(a) 2 Ir. Jur. 188.

E. T. 1857. The plaintiff is not prejudiced by this agreement, for he might maintain an ejectment for non-payment of rent on it. But further, the cases cited do not apply to ejectments in Ireland. It is admitted that, under the existing law in England, such a defence cannot be pleaded; but here it is pleadable. There is a manifest distinction between the Procedure Act in this country and that in England. In the Irish Act there is a clear intention to extend the principle of ejectment in the Civil-bill Courts. A plaint is nothing but an enlarged civil-bill; the defence is nothing more than the defence given by the Civil-bill Acts, in the form of a record, and in those Courts such a defence as the present is very usual. Further, the policy of the Act is to save the necessity of the circuitry and expense of an application to a Court of Equity by a tenant, to enable him to defend himself from vexatious proceedings. To disallow this defence would in effect be repealing the enactment.

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*B. Stephens* replied.

*Cur. advult..*

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CRAMPTON, J.

*May 6.*

We have had no doubt, from the beginning, as to our judgment in this case. But involving as it does an important principle for our guidance, in the application of the 85th section of the new Procedure Act, and the case before us being the first in which we have been called on for a solemn decision, we have let it stand over for a few days after the close of the argument; and I may add that the case was argued with much ability on both sides.

This was an action of ejectment for certain premises in the city of Dublin. The defendant has taken defence for a portion of the premises, and has pleaded, first, the usual legal plea, and secondly, the equitable plea, which is the subject of the present demurrer. The plea relies on a memorandum of agreement which, he contends, entitles him to hold possession of the premises for which he has taken defence. The plea states—[Here his Lordship read the plea above stated.]—Now it is to be observed here, first, that this memo-

random is a mere executory agreement, and that, in the contemplation of the parties, leases were to be executed, and a special clause of surrender was to be inserted in the lease; it does not say whether with or without previous notice to the landlord. There is no allegation of possession under the agreement, no allegation of rent having ever been paid, and no allegation of demand or refusal of a lease by the plaintiff. The plea must be taken most strongly against the pleader, and we must therefore presume that the defendant's possession (which is a possession of part only of the premises in the memorandum mentioned) is not a possession under the agreement, and that the defendant never had possession under it. The plea therefore does not call upon the Court to protect a possession acquired by virtue of the equitable instrument, but to protect a possession acquired under some other title, whether it be a bad or a good one.

This equitable defence is a novelty in our Courts of Law, as it is also in the English Law Courts. It is given by the 85th section of the 19 & 20 *Vic.*, c. 102—the new Common Law Procedure Act; and is given only in cases in which, if the plaintiff had judgment at Law, the defendant would be *entitled* (that is the stringent phrase used) to relief against such judgment upon equitable grounds; and he is to plead the facts which *entitle* him to such relief. The 83rd section of the English Act of the 17 & 18 *Vic.*, c. 125, contains a similar enactment, and in precisely the same terms as the Irish Act. In England, an equitable defence is not allowed in ejectment cases; and the Judges have founded that disallowance upon the ground that, by the English practice, no plea whatever is filed in actions of ejectment. In this country, where a plea in ejectment is always allowed, an equitable plea has been admitted; but it must be such a plea as the statute requires. We have, however, in reported cases, the benefit of the construction put by the English Judges upon the enactment in question; and in that construction we entirely concur. In our opinion, the facts stated in the plea must be such as in a Court of Equity would entitle the defendant to a perpetual injunction

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E. T. 1857. against proceeding on the judgment to disturb the defendant's possession; and that, an injunction unclogged by any condition, and final in its character.

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I shall only advert to two of the cases that have been cited during the argument, and it will be seen that they abundantly confirm the position which I have laid down. The last case is that of *Wodehouse v. Farebrother* (a), in the Queen's Bench. In that case, in which the question of the validity of an equitable plea arose (as here) upon demurrer, Lord Campbell, giving the judgment of the Court, thus (p. 287) expresses himself:—"The first objection to the plea is, that the defendant does not satisfactorily show that if such a judgment were obtained he would be *entitled* to relief against it on equitable grounds, within the meaning of the enactment." Again (p. 288):—"We are of opinion that, as yet, the Legislature has authorised us to receive a plea disclosing equitable grounds of relief only where the facts would entitle the defendant to an absolute and perpetual injunction against the judgment. In this last case no difficulty occurs; for the plea is a simple bar to the action, and we should only have to pronounce the Common Law judgment, 'that the plaintiff take nothing by his writ, and that the defendant go thereof without day.'" Again (in p. 290), his Lordship says:—"We think that a plea on equitable grounds is to prevail only where, followed by a Common Law judgment, it will do complete and final justice between the parties."

The same doctrine is laid down by the Judges of the Exchequer, in the earlier case of *Mines Royal Societies v. Magnay* (b). In this latter case the question arose upon the defendant's motion to be allowed to plead the equitable plea (p. 495). Baron Alderson says:—"The 86th section contemplates the case of an equitable plea being struck out when it cannot be dealt with by the Court so as to do justice between the parties. That section applies to this case, as we have not the power to do what a Court of Equity would require as a condition precedent to granting an injunction."

(a) 5 El. & Bl. 277.

(b) 10 Ex. 489.

Other cases there are to the same effect. I refer to these two cases only to show the construction which the Law Courts in England have put upon the enactment we are considering.

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Now, in this case, the defendant is not in possession under the agreement on which he relies. Can we affirm his right to that possession without deciding that he is *entitled*, upon the facts stated in his plea, to a decree for specific performance? Can we assume that the plaintiff has no cross equity on his side against such a decree? Our judgment (if for defendant) must be the Common Law judgment, "that the plaintiff take nothing by his writ, and that the defendant go thereof without day;" and thereby we establish that, without executing any lease, without paying the arrears of rent, the defendant is entitled to a perpetual injunction; and that, although by agreement the holding is to be a holding under lease. We cannot order leases to be executed. We cannot determine what clause of surrender, or on what terms the surrender is to be made. Again, the judgment should be a final judgment; but our judgment for the defendant in this case could not end the controversy; such a judgment must be followed by a suit in Equity; a suit on the one side, perhaps, for specific performance, and on the other side perhaps to rescind the contract, or to reform the agreement.

But it is said, if such an agreement as this cannot be pleaded to an ejectment, then the 85th section of the new Procedure Act is rendered ineffectual; by no means, I say. Suppose (not an uncommon case in this country) a tenant in possession, under an agreement to hold for a certain time, at a certain rent, without any contemplation by the parties of leases to be executed; such a tenant may have a fair ground of equitable defence against his landlord's ejectment on the title; or suppose the case of a tenant holding under a lease for lives renewable and the lives to be extinct, without default on the tenant's part; in such a case an equitable plea would be open to the tenant; and other cases of such equitable defences might be put; and generally, I should say, if the equity of the defendant be a clear and simple equity unclogged by conditions, and which, if allowed, would terminate all contro-

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versy between the parties, leaving nothing for subsequent equitable adjustment, I should hold such case to be a good equitable defence: It has been argued that this defence would be admitted in the Civil-bill Court, and that therefore it should be admitted in the Superior Courts. I admit that the law should be administered on the same principles in both Courts, so far as their constitution admits of it; but first, I would say, that in the Civil-bill Court all the facts and equities on both sides come before the Barrister without any pleading. The Civil-bill Court has large equitable powers within its own limits, and may do complete justice between the parties; but secondly, I think that if the facts stated in this plea, and none other, were brought before the Barrister upon the defence of an ejectment, it would form no defence for the defendant; the objection that he was defending a possession not obtained under the agreement would defeat him in that Court as well as in ours. It has been also contended that the plaintiff might reply to this plea, and deny the defendant's title to equitable relief upon equitable grounds. But the answer is obvious: this would be plainly to allow the institution of an Equity suit in this Court, in the way of cause and cross-cause, and to call upon us to make a decree upon the conflicting equities. I need not add that the statute has given no such jurisdiction to this Court. Lastly, it was said that the proper mode of objecting to this plea was by motion, and not by demurrer; but that objection is not sustainable. Either course is open to the parties; and the case being now before us on the record, we are bound to give our judgment upon it. In the two English cases to which I have referred, different courses were pursued; in one of these cases (that in the Exchequer) the question came before the Court upon motion, in the other case (that in the Queen's Bench) the question was decided upon demurrer. The demurrer therefore must be allowed.

Demurrer allowed.

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*Common Pleas.*

BEATTIE and another, Executors of BOAKE deceased,

v.

M'CRACKEN.

(*Common Pleas.*)

Jan. 29, 30.

THIS was an action for goods bargained, sold and delivered by the testator in his lifetime to the defendant. The summons and plaint consisted of the common counts, namely, for goods bargained, sold and delivered by the testator to the defendant at his request; for money due upon an account stated, to the testator; and for money due upon an account stated, to the plaintiffs.

The defendant pleaded to the first cause of action that no goods were bargained, sold or delivered, as in the summons and plaint alleged; and the only issue upon which any evidence was offered to the jury was, whether the goods were sold and delivered by the testator in his lifetime to the defendant, as in the plaint alleged?

This case was tried before the LORD CHIEF JUSTICE of the Common Pleas, at the Sittings after last Michaelmas Term; and it appeared that the goods in question, which consisted of horse-butts, had been ordered by the defendant and delivered to him; but that at the time of the order it had been agreed between him and the testator Boake, that if the defendant did not approve of the quality of the article when delivered, of which a sample had been previously sent, it was to remain in his hands until Boake should arrive in Belfast, and then be returned; that the goods had not been approved of by defendant when delivered, and that they were still lying in his hands, ready to be returned, but that the plaintiff's representatives refused to accept them.

At the close of the trial, Counsel on behalf of the plaintiff called upon his Lordship to direct a verdict for the plaintiff, upon the grounds that it was not open to the defendant to rely upon the

In an action for goods sold and delivered, the defendant pleaded that no goods were bargained, sold or delivered, as in the summons and plaint alleged.—*Held* (per MONAHAN, C. J., and BALL, J.), that under this plea the defendant was at liberty to prove that the sale had been by sample, and that the goods delivered were not of the same kind as the sample.

*Held* (per TORRENS and JACKSON, JJ.), that such matter of defence should have been specially pleaded.



H. T. 1856: above defence on the pleadings, but that such defence should have been specially pleaded. The jury having found a verdict for the defendant, leave was reserved to change it into a verdict for the plaintiff, if the Court above should be of opinion that the above matter should have been pleaded specially. A conditional order for this purpose having been obtained—

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*Macdonogh* (with him *M'Mechan*) showed cause.

The defendant pleaded that no goods were bargained, sold or delivered, as in the summons and plaint alleged, and thereby put the plaintiff upon proof of such a contract as would raise an implied promise to pay upon request. The plaintiff contends that the condition under which these goods were sold should have been set forth in the pleadings: but in this case, one side of the contract having been performed, the general form of *indebitatus assumpsit* was the proper one.

This is a defence by way of denial, and not by way of confession and avoidance, as described in section 70 of the Common Law Procedure Act. Under such a plea as this a party may, under the English practice, show that the goods delivered were not such as were contracted for, although there was a special contract to pay a certain price: *Cousins v. Paddon* (a); *Jervis' New Rules*, pp. 126–9. If this matter had been specially pleaded, the plea would have been set aside as argumentative, or amounting to the general issue: *Hayselden v. Staff* (b); *Morgan v. Pebrer* (c); *Jones v. Nanney* (d). *Edmonds v. Harris* (e) will be relied upon by the other side, but it has been overruled.

*Whiteside* (with him *A. Close*), in support of the conditional order.

The English New Rules cannot affect the present case, which must be decided according to the provisions of ss. 69, 70 & 71 of the Common Law Procedure Act, the object of which was

(a) 2 Cr., M. & R. 547.

(b) 5 Ad. & El. 153.

(c) 3 Bing., N. C., 457.

(d) 1 M. & W. 335.

(e) 2 Ad. & El. 414.

to induce the traverse of some particular fact. If the contract had been specially set forth in the summons and plaint, there is no doubt but that this defence should have been specially pleaded. Where goods delivered on the terms of sale and return are not returned within a reasonable time, the price may be recovered under the common counts for goods sold and delivered: *Moss v. Sweet* (a). A plea of sale according to sample is a good plea: *Sieeking v. Dutton* (b); and therefore such a defence could not have been objected to as embarrassing. The authorities cited by the other side refer exclusively to England, where the general issue has not been totally abolished; but in Ireland a plea of *never indebted* will not be allowed. Section 56 of the Common Law Procedure Act shows that the facts constituting the defence should have been specially pleaded. There is no doubt but that there was an order for these goods, and the only question was as to the delivery; for if that was complete there was a valid sale: *Smith's Mer. Law*, p. 482. The defendants introduced into the case a new element, viz., sale by sample; and can it be held that they may show such matter of avoidance under a simple traverse? The question is, whether there is such a material matter of fact as section 70 requires to be specially pleaded?

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*McMechan*, in reply, cited *Hebbert v. Shee* (c); *Lorymer v. Smith* (d); *Kemble v. Mills* (e); 2 *Sm. Lead. Cas.*, p. 1; *Hart v. Mills* (f); *Isherwood v. Whitmore* (g); *Dawson v. Collis* (h).

JACKSON, J.

This was an action for goods sold and delivered by the testator Boake to the defendant, and the summons and plaint consisted of the common counts. The defendant pleaded that no goods

(a) 16 Q. B. 493.

(b) 3 C. B. 331; S. C., 4 Dow. & Low. 197.

(c) 1 Camp. 113.

(d) 1 B. & C. 1.

(e) 1 M. & Sel. 757.

(f) 15 M. & W. 85.

(g) 10 M. & W. 757; S. C., 11 M. & W. 347.

(h) 10 C. B. 523.

H. T. 1856. had been sold and delivered as in the summons and *Common Pleas* alleged, and no other plea; and the jury found a verdict for the defendant, upon the ground that the goods furnished by the plaintiff did not correspond with the sample according to which the defendant had agreed to purchase. At the winding up of the case it was arranged that if this special matter of defence, namely, the difference in quality between the goods furnished and the sample previously sent, should have been pleaded, and that the Court above should be of that opinion, the verdict should be changed into a verdict for the plaintiff. I regret that I have been obliged to differ from other Members of the Court, having come to the conclusion at which I have arrived, upon the construction of the Irish Procedure Act; but I conceive that the peculiar effect of this statute and the policy of its provisions upon this subject are, that the opposite party may not be taken by surprise, by the defendant setting up at the trial a defence which does not appear upon the record, but that he may be apprised by the pleadings of the question for trial; and therefore, in this case, I think the special matter should have been pleaded.

The argument chiefly pressed upon us in support of the verdict is, that in England certain rules exist, under which it is competent for a defendant to plead the general issue of *non assumpsit* in an action for goods sold and delivered; but that, under that plea, a party cannot go into a defence at large, but is confined to a denial of the sale and delivery of the goods; and yet it is stated that, notwithstanding that rule, a defendant is allowed to go into a defence of this nature. If such be the decisions in England, I confess that it appears to me to be a violation or an evasion of the rule; for the rule is that a party is to be confined in proof to a denial of the sale and delivery of the goods. Is it not then a plain evasion of that rule to allow a party to contend,—true it is that certain goods have been sold and delivered, but they do not correspond with the sample?

My opinion is that this special matter should appear upon the record by way of defence, upon the ground that the Procedure Act requires that the opposite party should be apprised of the

defence which is intended to be set up; and therefore I am of opinion that this verdict should be changed into a verdict for the plaintiff.

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BALL, J.

I am sorry that I must differ with other Members of the Court, but I think that the verdict should stand, if the English decisions which have been relied upon apply to this country. I think that the pleadings sufficiently disclosed to the plaintiff the facts which have been given in evidence, and which evidence the plaintiff insists should have been specially set forth. The English cases show what is the state of the law in England, and I do not find anything in the Procedure Act of this country sufficient to raise a distinction. If this case depended altogether upon the English decisions, I should have no doubt, but it has been put upon two sections of the Procedure Act, s. 56 and s. 69. The former section provides that the defence and subsequent pleadings "shall state all facts which constitute the ground of the defence or reply, in ordinary language, and without repetition, and as concisely as is possible, consistent with clearness." Now I presume there can be no question but that a party defendant, notwithstanding the terms of this section, might traverse the fact of the sale of goods as alleged in the plaint; and in the present case the defendant has done so, by denying that the sale of goods took place as stated in the plaint. That being so, the parties go to trial, and it becomes incumbent upon the plaintiff to prove an affirmative according to the averments in his plaint, namely, that the goods were such as he alleged, and that a sale of them took place, as stated by him. He accordingly gives evidence to establish this, and it lies on the defendant to disprove it. There might be several ways by which he could have done so, for instance by evidence that there was no contract whatever entered into between the parties, or in other ways; but he has adopted this particular mode of disproof, namely, giving evidence that in point of fact the sale which took place was not a sale of the goods delivered, but that it was a sale of other goods, which had not been delivered; or, in other words, that there was no sale of the goods

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delivered, and no delivery of the goods sold. The jury were of that opinion ; and the defendant insists that he has established his traverse of the averment in the plaint, not by introducing new facts in evidence, but by negating the facts alleged by the plaintiff. In my judgment, he was entitled to take this course notwithstanding the terms of the 69th and 56th sections of the Procedure Act. Whether this be an argumentative traverse or not is beside the question. The Procedure Act does not in terms or by direct legislation prohibit an argumentative traverse, and if it does so at all, it is only by implication. But taking it to be argumentative, I apprehend that the only way in which the plaintiff could get rid of such a traverse would be by application to the Court, who would not set it aside as a matter of course, but would require special grounds for so doing ; for instance, if it were calculated to embarrass the opposite party, just as the Court would do with respect to any pleading which might be objectionable on the same grounds.

Upon the whole, therefore, I do not think that it was necessary that the evidence upon which the defendant sought to sustain his traverse in this case should have been spread out upon the plea ; and I am of opinion that it was competent for him to have adduced it under the defence he has pleaded.

TORRENS, J.

I am of the same opinion as my Brother JACKSON, and I have founded that opinion altogether upon the provisions of the 16 & 17 *Vic.*, commonly called the Common Law Procedure Act. I shall refer to the sections of that statute in support of my views.—[His Lordship read the 56th section.]—The words “and of such defence,” &c., are important, as they disclose exactly what the defendant should have done. Section 69 abolishes the general issue in these words—[His Lordship read the section ;]—and it repeats the provisions of the 56th section, thereby providing that the special matter is to be pleaded, or so much of it as shall be applicable. The 70th section follows up the provisions of the sections I have alluded to, and the words “every defence” are most material in considering the question. Now the question in the present case is this, whether

or not this defence be such special matter as should have been pleaded. The contest which arose between the parties was this, whether these goods had been sold absolutely and in their integrity, or merely by a sample which was to represent them? and this was the question for the jury. I ask whether the latter is not a different contract from that alleged in the summons and plaint? If it had been a sale by sample, should not the opposite party have been apprised that such was the intended defence, any cause of surprise being thereby removed, according to the intention and object of the statute? Now it has been asked over and over again, would you have evidence pleaded? On looking to the rules, I think that it must to a certain extent be pleaded, for the pleader must state some facts upon which the defence rests, and therefore you must state evidence to some extent. Legally speaking, evidence cannot be pleaded, but facts may. We have been pressed with certain English decisions upon which I must make a remark. These decisions are made under certain rules, prepared by the English Judges, for the purpose of altering the forms of pleadings, and by which the general issue was to some extent abolished, and they enacted new rules not recognised by any statute, but of their own invention. I believe that I have reason to know that these rules were not acceptable to a large portion of the profession in England, who looked forward to their abolition. The question, therefore, is not what the rule in England may be; but we are called upon to construe a legislative enactment in which provision is made, and by which it is clearly enacted that, where special matter arises, it is to be put upon the record, in order that the opposite party may not be taken by surprise at the trial. I need not go further; and although I do regret that I am obliged to differ with my Brother BALL, and that my LORD CHIEF JUSTICE differs with me, yet I do not regret that there will be no rule on the motion, for I believe that substantial justice was done at the trial below. Still I am bound to express my opinion, and I cannot read this statute without holding that the party should have set out this defence upon the record; and I believe it is the practice of the Court to allow parties to plead such special matter.

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*Common Pleas*

BOAKE

v.

M'CRACKEN.

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*Common Pleas.*

BOAKE

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MONAHAN, C. J.

I regret that I cannot concur in opinion with the majority of the Court who have already delivered their judgments, for whose opinions I entertain the most profound respect. There can be no doubt that this matter might have been specially pleaded under the provisions of this statute; but still what we are called upon to decide is, whether the defendant was *bound* to plead this matter specially, and could not avail himself of the plea as pleaded by him, to give these facts in evidence? When a difference of opinion arises between the Members of the Court, I feel bound fully to state the grounds of my own opinion. I have arrived at that opinion, first, upon what I conceive to be the true construction of the Common Law Procedure Act, without at all taking into consideration the effect of the English decisions; but on the other hand, I consider these decisions to be of authority in support of the view that I would otherwise have taken of this statute. The sections of the Act to which we have chiefly been referred are the 56th, the 69th and the 70th. The 56th section provides as follows.—[His Lordship read the section.]—This part of the statute appears to me merely to refer to the language of the pleading, and not to the matter which it is to contain: that is to say, plain ordinary language is to be adopted, and repetition avoided, and the statement is to be concise and clear. The meaning of the latter part of the section appears to me to be that, if a party brings an action for two demands, and the plea or defence only refers to one of these demands, that in such a case it must concisely state to which of the demands it is applicable; but I do not conceive that any part of this section refers to the substance of the plea. Then come sections 69 and 70, by the meaning of which this defence is to be governed.—[His Lordship read section 69.]—It is the former part of this section which alone comes under our consideration; and it appears to me that this section does not refer to the Common Law effect of the general issue, but to particular statutes, under the provisions of which Justices of the Peace, Police-officers and other persons were allowed to plead the general issue, and to give special facts in evidence;

therefore it occurs to me that the operation of this section was only to deprive certain persons of a particular defence under the general issue, but that it does not decide what the effect of the general issue, in any case in which it is still applicable, would be in the case of a person not requiring that privilege; and therefore what was formerly considered the general issue still continues in several forms of action; for instance, in an action upon a deed, the defendant may still plead *non est factum*; but nothing is to be given in evidence under it, except the execution or perhaps the binding nature of the deed. Therefore I conceive that the 69th section only refers to a particular class of persons; but the section upon which this question is to be really decided is the 70th.—[His Lordship read the 70th section.]—The effect of this section is to abolish the general issue in this country in a great measure; for we all hold that the plea of *nil debet* is not a good plea in an action of debt; for this plea in substance says, "I (the defendant) do not owe the money;" and, if it were allowed to stand, it would be supported by evidence of payment or other facts discharging the defendant, or showing the non-existence of the debt. We have not yet been called upon to decide as to the validity of *non assumpsit*, because there is no promise alleged in the general form; but almost all of these actions are now brought in the form of an action of debt, and not *assumpsit*; but even if it were otherwise, the Judges could not allow the plea of *non assumpsit*, as being calculated to embarrass the plaintiff, who could not know what evidence might be given under it. But it has been always held that a party might plead that the goods in question were not sold and delivered by the plaintiff to the defendant. The action in the present case is not for goods merely bargained and sold, but a delivery is averred, and the action is for a particular set of goods. The defendant in his traverse says, "the goods were not, in point of fact, sold and delivered to me by the plaintiff's testator." This appears to me sufficient (with the utmost respect for those Members of the Court who are of another opinion); and it is only by carefully considering what the meaning of the plea is, that we can remove the difficulty. I think the meaning of the plea is this:—"Those particular goods for

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which you seek to recover were never sold to me." We may put delivery out of the question. The question is, were the goods which were sent the goods sold? The defendant says these goods were not sold, and therefore the plaintiff was bound to show that they were sold; and the evidence at the trial was, not that these particular goods were bargained for at all, but that it was agreed between the parties not that any particular lot of goods should be sent, but a lot which would correspond with a sample which was produced. The jury were of opinion that the goods in fact sent were not the goods which the vendor agreed to sell or the vendee agreed to accept. Therefore, in my opinion, the evidence proved that the particular goods for which the action was brought were never sold by the plaintiff's testator to the defendant. Several cases have been suggested in the argument, and this case might also have been put:—"True it is, I have the goods, and they were "delivered to me; but the plaintiff's testator did not sell them, but "gave them to me as a free gift." In such a case the proper plea, if the facts are to be specially stated, would be, "the goods were not sold and delivered, but they were a free gift." If an issue were then to be settled upon these pleadings, it would be, whether or not the goods in question were sold and delivered by the plaintiff to the defendant, and not whether or not the goods were a free gift; and in the present case, a special defence would after all amount merely to this, that the particular goods were never sold to the defendant. Any defence that might have been specially pleaded could amount only to this:—"When you sent goods, you "did not send the goods which you agreed to send, and I did not "retain them as mine." If there had been a sale and delivery, the property would have passed to the vendor; but, in the present case, the property did not pass (assuming the facts to be as found by the jury); for the facts were such that if the plaintiff sought to move these goods to-morrow, he should bring an action in the nature of *trover*, and not an action for goods sold and delivered. Therefore, although I do not say that a party could not have pleaded the facts specially in this case, I am of opinion that this traverse is sufficient, as coming within the provisions of the statute.

The English cases which have been cited also bear out this view of the question, although they do not exactly decide the point; but I would have arrived at the same conclusion had those decisions been never pronounced. The English statute enables the Judges to make rules regulating the pleadings and the practice of the Courts, which were to have the same force as an Act of Parliament, and these rules do not altogether take away the general issue, but give it a certain effect. Thus, in an action upon a warranty, it will only amount to a denial of the warranty; and in an action upon a bill of exchange, it will amount to no more than a denial of matters particularly stated; but in express terms it is stated that, in an action for goods sold and delivered, it will operate as a denial of the sale and delivery of the goods: therefore I think that when it is pleaded in such an action, it is to be taken as a plea denying the sale and delivery of the goods. Accordingly, a case arose in England, just as here, in which the party had pleaded the general issue, or, in other words, that the goods were not sold and delivered, and a question arose whether this defence was open to the general issue. There was at first some difficulty; but, upon consideration, all the Courts decided that, upon a plea having the operation of a denial of the sale and delivery, a party might show that these were not the goods sold and delivered; for although delivered, they were not the goods contracted for. Therefore, without going further into the case, and after considerable hesitation (on account of the diversity of opinion that exists in other Members of the Court), I need only say that I have come to this conclusion altogether upon the construction of these sections, and also upon the fact that this was the case of a sale by sample. I do not mean to decide that this rule would apply to the case of a sale of a specific parcel, with warranty of being equal to sample, or to one upon the terms of sale and return; for, in these cases, it might be contended that the particular goods were in fact sold; but here, there being an express agreement that the goods to be sold should correspond with a sample, and that the party might return the goods in case they did not correspond with the sample, in my opinion, the goods sent to the defendant were never sold to him.

No rule, the Court being equally divided.

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## HORNETT v. AHERN.

Nov. 11.

Where the copy of the summons and plaint served omitted to state the venue, which was properly set forth in the original as filed, of which latter fact the defendant's attorney was aware, the Court refused to allow the costs of a motion to set aside the copy and service.

THIS was an application to set aside the copy of the summons and plaint, upon the grounds that the copy served set forth no venue. The original upon the file contained the proper venue, and it was admitted by the defendant's attorney that he was aware of the latter fact at the time of serving notice of this motion. The copy had been served upon the 23rd of October.

*Jellett*, in support of the motion.

*Sullivan*, contra.

The copy must be amended; and the only question in the case is relative to the costs of the motion, which should not be allowed to the defendant's attorney, as he admits that he was aware of the correctness of the original.

*Per Curiam*.

Let the plaintiff be at liberty to amend, without costs; the defendant to plead to the summons and plaint as if served to-day.

Rule accordingly.

Nov. 15.

## BURKE v. SUTTON.

The affidavit of a physician is necessary in support of a motion for leave to take the deposition of a witness unable to attend the trial, from ill health.

HARRIS applied for leave to take the depositions of the plaintiff in this case, upon the grounds that he was dangerously ill and the deposition of a witness unable to attend the trial, from ill health.

unable to attend the trial. He relied upon the certificate of the plaintiff's physician.

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Common Pleas.  
BURKE  
v.  
SUTTON.

*Tandy*, contra.

The mere written certificate of a physician is not sufficient; he should have made an affidavit setting set forth the facts relied upon: *Davis v. Lowndes* (a).

MONAHAN, C. J.

Even if the depositions of the plaintiff are produced at the trial, it will be necessary to prove that he is unable to attend to give evidence. However, if you insist upon the authority cited, we must follow that case, and will allow the present motion to stand until Tuesday next, that the other party may procure the necessary affidavit.

Rule accordingly.

(a) 7 Dowl. P. C. 101.

#### M'DONNELL v. ANDERSON.

Nov. 17.

In this case an application had been made at the office for a Side-bar order, under the provisions of the 138th\* section of the Common Law Procedure Act, for the purpose of charging in

Under the provisions of section 138 of the Common Law Procedure Act, it should appear by the affidavit required to procure a Side-bar order, that the party sought to be charged in execution is already in the prison of the Court.

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\* NOTE.—Section 138:—"It shall not be necessary, in any case, to sue out a writ of *habeas corpus ad satisfaciendum*, to charge in execution any person already in the prison of the Court; but such person may be so charged in execution by a Side-bar order, upon an affidavit that judgment has been signed and is not satisfied; and the service of such order upon the keeper of the prison for the time being shall have the effect of a detainer."

**M. T. 1856.** execution a person already in custody; but the officer refused  
*Common Pleas.* the order, inasmuch as the affidavit upon which the application  
**M'DONNELL** had been made did not state that the person sought to be charged  
**v.** in execution was already in the prison of the Court; and the  
**ANDERSON.** present motion was accordingly made for a direction to the officer  
to allow the order to issue.

*Dowse*, in support of the application.

The affidavit need not allege that the party sought to be charged is already in the prison of the Court, for the section does not require it; besides, unless he be already in custody, such an application for a Side-bar order would be futile.—[BALL, J. Nevertheless you must show that he is in the custody of the Marshal.]

*Per Curiam.*

We must hold the affidavit insufficient upon these grounds.

No rule.

#### ATKINSON v. BAKER.

*Nov. 21.*

To an action for seizing the plaintiff's goods, &c., the defendant pleaded that he did not take or carry away the plaintiff's goods; that the goods, &c., in the summons and plaint mentioned, were not the goods, &c., of the plaintiff, but the goods of a third party; and that the defendant seized them by virtue of a writ of *fi. fa.* directed against that party.—*Held*, that the defence was not double, so as to require the leave of the Court to plead several matters, under the provisions of the 45th General Order.

THIS was an application to set aside a judgment that had been marked, under the provisions of the 45th General Order. The summons and plaint alleged that the defendant had broken and entered the dwelling-house of the plaintiff, and had carried away the goods and furniture of the plaintiff. There was also a count in trover.

The defendant pleaded that he did not break, &c., nor take

or carry away the goods and furniture of the plaintiff, as in the  
 plaint alleged; and that the goods and furniture in the plaint  
 mentioned were not the goods and furniture of the plaintiff when  
 the same were seized by the defendant, but that they were the  
 proper goods of one R. J. D.; and that the defendant lawfully  
 seized and took them, by virtue of a writ of *fi. fa.* lodged in  
 his hands as Sheriff of the county of Dublin, at the suit of one  
 S. C., against the said R. J. D. Leave of the Court to plead  
 several matters of defence not having been previously obtained  
 by the defendant, the plaintiff marked judgment under the pro-  
 visions of the 45th General Order.

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*Common Pleas.*  
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*O'Mahony*, in support of the motion.

The defence is not double: it merely alleges that the goods  
 seized were not the goods of the plaintiff, although it states several  
 facts in support of that conclusion.

*Macdonogh* (with him *J. Philips*), contra.

The defence contains five traverses and one justification, viz.,  
 first, that he did not enter, &c.; secondly, that the house was  
 not the house of the plaintiff; thirdly, that he did not seize the  
 goods; fourthly, that they were not the goods of the plaintiff;  
 fifthly, that, on the contrary, they were the goods of R. J. D.;  
 and sixthly, that he was justified in the seizure, as acting under  
 the authority of a writ of *fi. fa.*—[MONAHAN, C. J. Is not the  
 substance of the plea this—I did not seize the property of the  
 plaintiff, but of a third party? If the plea had stopped after the  
 averment that the defendant did not seize the goods of the plaintiff,  
 it might be held to be an argumentative and embarrassing plea;  
 but it removes that difficulty by explaining whose goods were  
 seized.]—This case is precisely similar to *Germaine v. The Athe-  
 naeum Life Assurance Company* (a). The averments in the present  
 defence must be viewed as distinct, the justification pleaded being  
 altogether separate from the traverses.

(a) 5 Ir. Com. Law Rep. 205.

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*O'Mahony* was not called on to reply.

MONAHAN, C. J.

We are of opinion that the application should be granted. The defendant says, "I did not seize the plaintiff's goods." Now, if his defence had stopped there, it would have been embarrassing to the plaintiff, as he could not tell whether the defendant intended to deny the act of seizure, or the property in the goods. The defence, however, does not stop there, but it proceeds to allege—"But the goods were the property of R. J. Darlington." We must, therefore, regard it as a special plea traversing the plaintiff's property in the goods.

The case of *Germaine v. The Athenæum Life Assurance Company* is correctly reported. In that case several separate matters were pleaded, each a complete answer to the action; but in this case the entire defence was in reference to the property of the plaintiff in the goods which had been seized by the defendant.

JACKSON, J.

It is more properly tautology than duplicity which is to be found in the present defence.

BALL and KEOGH, JJ., concurred.

Judgment to be set aside, without costs.

#### BERGIN v. M'DOWELL.

Nov. 22.

The 102nd section of the Common Law Procedure Act authorises a Judge, at the settlement of issues, also to regulate the form of the abstract of the pleadings; and such is the proper mode of proceeding where the abstract is irregular or defective.

THIS was an application made on behalf of Vincent Scully, to set aside the abstract of *Nisi Prius*, and the notice of trial served by

the plaintiff, as being irregular and defective, and not in accordance with the provisions of the 102nd section of the Common Law Procedure Act, inasmuch as the abstract did not set forth the pleadings, or tender the issues raised upon them. In this action, which was brought upon a *scire facias*, the summons and plaint alleged that a judgment for £201. 14s. 6d. had been recovered by the plaintiff in June 1856, against the defendant, as official manager of the Tipperary Joint-stock Bank; and that the plaintiff was entitled to sue out execution thereon, and that there was no property of the Bank available at the time, it being under the administration of the Court of Chancery; that Vincent Scully was then, and still is, a member of the co-partnership, and that he should, therefore, appear and show cause why execution should not issue against him. The defence stated that, up to the time hereinafter stated, Vincent Scully had been a member of the co-partnership, which was regulated by a deed of settlement of the 5th of July 1842, by which it was provided that the proprietor of any shares in said co-partnership might procure some other person to become a proprietor (with the assent of the directors) of such shares, and his name be entered in the register-book as the proprietor, and that after such entry the former proprietor should cease to be a member of the co-partnership; and that accordingly, on the 20th of December 1854, the said Vincent Scully procured Robert Keatinge to become a proprietor of the shares which he (Vincent Scully) formerly held; and that, with the assent of the directors, certain acts were done (which were fully set forth in the plea), whereby Vincent Scully ceased, on the 4th of April 1855, to be a member of the co-partnership; and also stating that, under the circumstances, it was impossible for the Bank to make the annual return to the Stamp-office required by Act of Parliament; and that Vincent Scully was not a shareholder at the time of the issuing of the writ of *scire facias*. The abstract of Nisi Prius, after fully stating the writ of *scire facias*, proceeded as follows:—"And whereas the said Vincent Scully, on "Friday the 14th of December 1856, filed a defence to the said "writ of *scire facias*, alleging that he assigned his shares in the

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*Common Pleas.*

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v.  
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M. T. 1856. "Tipperary Joint-stock Bank in the year 1855, and that the said  
*Common Pleas.* "Vincent was not, at the time of issuing the said *scire facias*, a  
 BERGIN  
 v.  
 M'DOWELL. "therefore, let the jury try first, whether the said Vincent Scully,  
 "in the year 1855, duly assigned his said shares, pursuant to the  
 "deed of partnership and the statutes in that case made and  
 "provided : and secondly, whether the said Vincent Scully, at  
 "the time of the issuing of the said *scire facias*, was a shareholder  
 "or member of the said co-partnership."

*Brewster* (with him *B. Sullivan*), in support of the motion.

The 102nd section requires that the plaintiff's attorney shall furnish the opposite party with an abstract of the pleadings and issues in fact. Now, one of the chief questions raised upon the defendant's plea is, the validity of the registration, which is altogether omitted in the abstract.—[MONAHAN, C. J. It certainly does appear that this abstract, as regards the defences, is insufficient; but why not come before a Judge to settle the issues and abstract at the same time? The section seems to authorise such a proceeding.]—The authority of the Judge to settle the issues depends upon the abstract; for it is upon it that the form of the issues depends.

*G. Fitzgibbon*, contra.

*D. Heron*, on the same side, was not called upon.

*E. Sullivan* was heard in reply.

MONAHAN, C. J.

The objection taken by the defendant applies both to the abstract of *Nisi Prius* and to the issues furnished by the plaintiff. If the parties cannot agree to the terms of the abstract, their proper course is to come before a Judge, who can settle not merely the form of the issues, but also the form of the abstract. It frequently occurs that parties come before me to settle issues; and when I

object to settle the issues in the form that they desire, they find it necessary to apply to the Court for leave to amend their pleadings.

We must refuse this motion, with costs.

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v.  
M'DOWELL.

BALL, JACKSON and KEOGH, JJ., concurred.

Motion refused, with costs.

### FITZGERALD v. MARSH.

Nov. 22.

THIS was an application under the 22nd section of the Court of Chancery (Ireland) Regulation Act.\* The action was for a bill of costs; and a cause petition had been filed in the Court of Chancery for the administration of the personal estate sought to be affected by the action, and an order had been made referring the petition to the Master.

An application under the provisions of section 22 of the Chancery Regulation Act should be made before a single Judge, and not before the Full Court.

*J. Ball*, in support of the application.

BALL, J.†

The jurisdiction created by the statute under which this application is made is vested in a single Judge; the Full Court is now sitting, and therefore cannot dispose of the motion: your application can be made in Chamber. Such powers are frequently

\* Section 22 provides that, after a reference to the Master, of a petition with respect to the administration of assets, no creditor shall sue at Law without the Master's leave; "and it shall be lawful for any Judge of the Court in which any such action is pending, to order that all further proceedings in such action be stayed, until after such leave as aforesaid of the Master has been obtained, and to make such order as to the costs of any such action as to such Judge shall appear just."

† MONAHAN, C. J., *absente*.

M. T. 1856. *Common Pleas.* given "to the Court or a Judge:" in the present case they are given to a Judge alone, which shows that the Legislature intended to make a distinction.  
**FITZGERALD**  
v.  
**MARSH.**

**JACKSON, J.**

I should be disposed to entertain the motion, as I conceive that where one Judge is empowered to do a certain thing, *a fortiori*, three may do the same.

**KROGH, J.**

I believe the practice of this Court to be as stated by my Brother BALL, that the motion should be made before a single Judge.

No rule.

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E. T. 1857.  
*Exch. Cham.*

*Exchequer Chamber.\**

ERRINGTON v. BORKE.

(*Error from the Court of Queen's Bench.*)

Jan. 26.  
 April 6, 7.

**EJECTMENT** on the title, to recover possession of that part of the Bog of Allen and Clunagh, running in a stripe or belt along the adjoining lands of Muckland, in the possession of William Metcalf; and which stripe or belt was part of the bog conveyed to the plaintiff by the Commissioners for Sale of Incumbered Estates in Ireland, by deed, dated the 29th of July 1853; and which stripe or belt began at the new road leading from Timahoe to Enfield, where it crossed said bog, and ended at the north-eastern boundary of that part of the said bog conveyed to the plaintiff as aforesaid, by the Commissioners, situate in the barony of Carbery and county of Kildare.

In an ejectment on the title, the plaintiff relied on a conveyance made to him by the Commissioners of Incumbered Estates, of certain lands, amongst them the lands sought to be recovered, which lands were described in the conveyance and a map annexed thereto. The defendant rested his defence on

To this ejectment the defendant took defence for all that part a lease (still subsisting) of the lands sought to be recovered, and made prior to the conveyance, but not referred to therein, the particulars of which lease had been set out by him pursuant to notice from the Commissioners, and were inserted in the rental of the lands sought to be sold, but were not comprised or set out in the rental of the lot purchased by the plaintiff; and also proved that subsequent to the sale to the plaintiff, and prior to the conveyance, a portion of the lands sold was taken from the plaintiff, and other lands were given to him in lieu thereof, which were taken out of lands remaining unsold, and the map attached to the conveyance differed accordingly from that of the rental of the lot purchased.—*Held* (reversing the judgment of the Queen's Bench), that such evidence was improperly admitted.—(*Dissentiente, LEFROY, C. J.*)

In his charge to the jury, the learned Judge told them that, although the premises sought to be recovered were within the ambit of the map traced upon the conveyance, and the defendant's lease was not mentioned or referred to in the conveyance, yet, if the premises sought to be recovered were demised by that lease, and that plaintiff purchased subject to that lease, it would virtually be only a purchase of the reversion expectant upon the lease, and then upon the evidence of the Commissioners' conveyance would only operate to pass the reversion in fee expectant upon the lease, but would not entitle the plaintiff to recover possession during the lease.

*Held*, a misdirection, and that the conveyance by the Commissioners operated to pass the fee-simple in the lands discharged of the lease, and conferred an indefeasible title upon the purchaser.—(*LEFROY, C. J., dissentiente.*)

\* PENNEFATHER, B., MOORE and KEOGH, JJ., *absentibus*.

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of the Bog of Muckland, containing, by estimation, 20a. 3r. 26p., as formerly in the possession of John Lucas Wilton, and now in the possession of the defendant; and which was by the summons and plaint sought to be recovered as part of the Bog of Allen and Clunagh.

On these pleadings the following issues were sent for trial:— Whether the plaintiff was entitled to the possession of said lands, or any portion of them, on the said day, or at any time subsequent to such day, and before the commencement of the action? Secondly, whether the plaintiff was entitled to any, and what, damages, for the loss of meane rates and profits?

The case was tried before LEFROY, C. J., at the Summer Assizes of 1855, for the county of Kildare. In support of his case, the plaintiff gave in evidence a deed of conveyance, with a map in the margin thereof, which map was referred to by the conveyance. This conveyance bore date the 29th of July 1853, and was executed by two of the Commissioners for the Sale of Incumbered Estates in Ireland, and was sealed with the seal of said Commissioners. By this conveyance the said Commissioners, under the authority of the Act of Parliament, in consideration of the sum of £510 paid by the plaintiff, granted unto the plaintiff that part of the said Bog of Allen and Clunagh, situate in the barony of Carbery and county of Kildare, containing 777a. 3r. 24p.; and which said lands were in said conveyance mentioned to be described in the map annexed thereto, with the appurtenances:—*Habendum*, unto the plaintiff, his heirs and assigns for ever, subject to the rights of turbary of the lessees therein named, of the lands of Dunforth, Mylerstown, Clunagh and part of Muckland, as set out in the schedule annexed to said conveyance.

The plaintiff then produced as a witness George Taylor, who deposed that he had traced the map upon the margin of the conveyance; that he had seen and gone carefully through the lands in the conveyance referred to; and that he sketched the said map from the map attached to the rental under which the estate was sold; that he saw the lands sought to be recovered in this ejectment, and described in the summons and plaint; that

he knew the new road leading from Timahoe to Enfield; and that the place where the said road crossed the Bog of Allen was correctly represented upon the map. The witness pointed out upon the map the lands sought to be recovered by the plaintiff in the ejectment, and described their boundaries, situation and locality; and deposed that every portion of them was within the boundary line of the map.

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On cross-examination, he proved that a rental and map (produced by defendant's Counsel) were the rental and map referred to by him on his direct examination; that the map on the margin of the conveyance was not exactly the same map as the map of the lot purchased by plaintiff, and set out in the rental; but that a portion of the bog included in the latter map had, after the purchase, been taken from plaintiff by Commissioner Longfield, and had been by the Commissioners granted to one Richard Bolton, for £10; and that in lieu thereof a different portion of bog had been granted to plaintiff by the Commissioners, which witness described as next adjoining the words "Muckland Bog," at foot of the map on the margin of the conveyance, and as now part of the lands sought to be recovered. The plaintiff, with this evidence, closed his case.

The defendant, in support of his case, produced a lease, bearing date the 9th of March 1822, from Frederick Hamilton to John Lucas Wilton, demising that part of the Bog of Muckland, then in the possession of Wilton, containing 20a. 3r. 26p., together with the appurtenances, for a term of three lives, or thirty-one years, subject to the rent therein mentioned, and an assignment of this lease to the defendant.

This lease was offered in evidence as a lease of the premises sought to be recovered in the ejectment; and Counsel for the plaintiff objected to the reception of such evidence, inasmuch as no such lease was mentioned in the conveyance by the Commissioners of the Incumbered Estates Court—the lands having been thereby conveyed without mentioning that they were subject to any such lease and assignment. The learned Judge, however, admitted the evidence, and plaintiff thereupon excepted.

E. T. 1866.  
*Each. Cham.*  
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BORKE.

The defendant was then produced as a witness, to prove that the lands sought to be recovered in the ejectment were the premises demised by the lease and assigned to him. Counsel for the plaintiff objected to the reception of this evidence, and insisted that the defendant should not be allowed to go into evidence of title to the premises anterior to the conveyance of the Incumbered Estates Court; but the learned Judge admitted the evidence.

Defendant then deposed that the premises sought to be recovered were the lands demised by the lease of the 9th of March 1822; that two of the lives named in the lease were still in existence; that Wilton was in possession of said lands under this lease when he assigned them to witness; and that he (witness) had been in possession of them under said assignment ever since; that before the sale by the Incumbered Estates Court, and while the case of *Hobhouse v. Hamilton* was pending, Abraham Collis was appointed receiver of the Court of Chancery over said lands; that witness had been in possession of seventy-six acres of the lands of Muckland, being fifty-six acres more than he was entitled to; that Collis, under the direction of the Master in Chancery, required possession of those fifty-six acres, and that witness freely relinquished the possession of them; that the bailiff and surveyor of the estate then lockspitted off the twenty-one acres which the defendant held under the lease and assignment, from the fifty-six acres which the defendant then gave up possession of; and that these twenty-one acres were the lands sought to be recovered in this ejectment; that these lands were always known as "Muckland," and not as "Allen and Clunagh."

Counsel for the defendant then offered in evidence the printed rental\* under which the plaintiff purchased in the Incumbered Estates Court; this was objected to, on the ground that it was anterior in date to the conveyance. The learned Judge admitted this evidence; and the admission of this, and the parol testimony, formed the ground of the second exception.

Counsel for the defendant then gave in evidence the following notice, served upon the defendant by order of the Commissioners,

\* See next page.

*Lot No. 3, Rental of the Townlands of Chusagh and part of Muckland, situate in the Barony of Carberry,  
County of Kildare.*

No. on Map.	Denomination.	Tenants' Names.	Quantity of Land, Statute measure.	Quantity of Land, Irish Plantation measure.	Gale Days.	Yearly Rents.	Tenure.	Observations.
1, 2, 3 and 4.	Part of Muckland	John Borko, assignee of John Wilton	A. 33 R. 3 P. 20	A. 20 R. 3 P. 26	1st May, 1st Nov.	£ s. d. 0 1 0	Lease for 3 lives or 31 years from 9th March 1822.	The life now in being, Thomas Hamilton. This tenant formerly occupied 56a. 1r. 2p. over the quantity in said lease; but he has lately given up this overplus quantity to the receiver under the Court of Chancery, and which is now unset. The counterpart is not forthcoming; but a certified copy will be handed over to the purchaser.

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E. T. 1856. sealed with their seal, in which notice the lease under which the  
*Exch. Cham.* defendant held was admitted to be valid and subsisting:—

**HERRINGTON**

**v.**

**ROKER.**

**"INCUMBERED ESTATES COURT.**

*Notice by the Commissioners for Sale of Incumbered Estates in  
 Ireland.*

TO ALL WHOM IT MAY CONCERN.

<p>In the matter of the Estate of          Christopher Hume Lawder, as-          signee of Frederick Hamilton,          Owner;</p> <p>Ex parte          Luke John M'Donnell and Law-          rence Waldron, Petitioners.</p>	}	<p>THE Commissioners for the Sale of In-          cumbered Estates in Ireland have or-          dered a sale (amongst others) of the          lands of Dunford, Mylerstown, Kilmer-          nay, Kilshanroe, Ballinamallagh, Clunagh, Muckland, Gurteen,          Kilmurray Bog, Muckland Bog, Bog of Allen and Derries, situated          in the barony of Carberry and county of Kildare, the estate, as          it is alleged, of Frederick Hamilton, of Dunford in the said county,          Esq., subject to the leases, agreements for leases, and tenancies          from year to year, set forth in the schedule hereto. If any person          objects to the said sale, on the grounds that he has any interest          in the agreement, or that tenancy is incorrectly stated in said sche-          dule, he must lodge his objections, in writing, with the Secretary          to the Commissioners, on or before the 26th of June next, otherwise          his interest will be barred and concluded by said sale. And such          objection must be verified by an affidavit entitled as above, and          sworn, if out of Dublin, before one of the Masters Extraordinary  <i>of the Court of Chancery, and transmitted</i> * to the Secretary of the          Commissioners, No. 14 Henrietta-street, the postage being first paid.</p>
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Dated 26th of May 1851.

(L. S.)

HENRY CAREY, Sec.

Thomas Hamilton, Solicitor having the carriage of said order."†

Counsel for the defendant then gave in evidence the following  
 order of the Commissioners, dated 6th of May 1853:—

"Upon motion of Counsel for Richard Bolton, a purchaser of lot  
 "No. 5 in the rental in this matter, and on reading the report of

\* The words in italics omitted in the copy of notice.

† For Schedule see next page.

SCHEDULE referred to in the foregoing Notice, containing particulars of all Tenants' leases and tenancies from year to year of the said lands ordered to be sold.

No.	Townland or Denomination.	Tenant's Name.	Rentcharge.	Gale Days.	Yearly Rent, British currency.	Quantity of land in Irish measure.	Date and description of instrument (if any) under which Tenant holds, and tenure of each Tenant.
19	Part of Muckland ...	John Rorke, assignee of John Wilton	...	...	£ s. d. 0 1 0	A. R. P. 20 3 26	Lease for three lives or thirty-one years, from 9th of March 1822 (unexpired term of two years from 9th of March 1831, and a residue of one life, Thomas Hamilton, second son of lessor, now aged forty years). This tenant is in occupation, as appears by a late survey, of 56a. 1r. 2p. Irish, over and above the quantity demised by said lease.

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*Exch. Cham.*  
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E. T. 1856. "J. Byrne, the surveyor, made in this matter, and G. Taylor, on  
*Esch. Cham.* "behalf of Errington, the purchaser of lot No. 4 in said rental,  
 ERRINGTON "consenting to settle and make out boundaries, it is ordered by  
 v. "the Commissioners that the arrangement, bearing date the 8th  
 HORKE. "of April last, between the said surveyors on behalf of said pur-  
 "chasers, be carried out; and accordingly, that the portion of the  
 "bog heretofore sold as part of lot No. 4, therein specified, be  
 "conveyed to the purchaser of the lands of Ballinavallagh, being  
 "lot No. 5, and that in lieu thereof the purchaser of lot No. 4  
 "shall have an equal quantity of the Bog of Clunagh, now unsold,  
 "next adjoining lot No. 4; the said Richard Bolton paying therefor  
 "the sum of £10 to the credit of the estate in this matter."

Defendant's Counsel then produced Thomas Scott, who deposed that he, in August 1851, was employed as a surveyor by the receiver in the Chancery cause, to make a survey of the 77 acres of the bog of Muckland, then in defendant's possession; produced map, which he deposed was accurate, and that he had lockspitted off 21 acres from the 77 acres, by direction of the receiver. Patrick Dempsey, bailiff of the estate, proved that in August 1851 defendant had given up possession of the 56 acres of the bog of Muckland; that he pointed out to the surveyor where to mark off the 21 acres from the 56 acres; that he remembered when Wilton was in possession of the 21 acres; that he knew the lands for upwards of thirty years, and that they were always called Muckland, and never known as Allen and Clunagh.

The CHIEF JUSTICE told the jury, that although the premises sought to be recovered on this ejectment were within the ambit of the map traced upon the margin of the conveyance of the 29th of July 1853, and although the lease of the 9th of March 1822 was not mentioned or referred to in the conveyance, yet if the premises sought to be recovered were demised by the lease of the 9th of March 1822, and that the plaintiff held subject to that lease, it would be virtually only a purchase of the reversion in fee expectant upon that lease; and then upon the evidence, the conveyance from the Commissioners of Incumbered Estates in Ireland would only operate to pass the reversion in fee expectant upon the said lease,

but would not entitle the plaintiff to recover during the lease. To this opinion of the CHIEF JUSTICE the plaintiff excepted, and insisted that the conveyance of the 29th of July 1853 operated to pass the fee-simple of the lands and premises in possession thereby purported to be conveyed discharged of the lease; and submitted that the CHIEF JUSTICE should direct the jury that if they believed the premises sought to be recovered by this ejectment were within the ambit of the map depicted on the margin of the conveyance of the 29th of July 1853, and by the Commissioners referred to, they should find for the plaintiff. This the CHIEF JUSTICE refused to do; and this refusal formed the ground of the third exception.

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*Esch. Cham.*  
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*Brewster*, with him *H. Smythe* and *Pallas*, in support of the exceptions.

The question left by the CHIEF JUSTICE to the jury was a question of law, and not of fact, and he should have decided that himself. This conveyance operated to pass the premises discharged of the lease; the Commissioners having jurisdiction to convey, the conveyance made by them gave the purchaser an indefeasible title, even though the Commissioners may have fallen into an error respecting the estate: *Rutledge v. Hood* (a). The defendant has no right to go behind the conveyance; it passes the estate discharged from all claims except such as are expressed or referred to in it: *McCarthy v. Bayly* (b). The Court must presume that everything necessary to be done by the Commissioners was done, and consequently must assume that they decided against the validity of defendant's lease: *O'Donnell v. Ryan* (c).

*Forbes Johnson*, for defendant.

The powers conferred upon the Commissioners by the Act may be divided into two classes; first, the powers of sale; secondly, the powers of adjudication. With respect to the first, the judgment of the Court below is correct, for two reasons; first, because the Com-

(a) 3 Com. Law Rep. 447.

(b) 7 Br. P. C. 218.

(c) 4 Com. Law Rep. 44.

E. T. 1857. *missioners had no power to sell Rorke's estate, it being unincumbered; and secondly, because the conveyance under which the plaintiff's claim is executed is in violation of the provisions of the 24th section of the Act.*  
*Esch. Cham.*  
 HERRINGTON  
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In the interpretation of every Act of Parliament the chief rules to be observed are these:—first, that every word in it must, if possible, have its effect; and secondly, that it must be construed in relation to all other laws, with a view to their maintenance and preservation. The sections conferring the power of sale upon the Commissioners are the 16th and 17th, and the power here created is, even in respect of the incumbered estate, not *absolute*, but conditional; for it authorises a sale only with the consent of either the owner or an incumbrancer. It is said that the absolute power is conferred by the 27th section; but this section does not in fact confer any power whatsoever upon the Commissioners. It does not even profess to deal with an *active* agent, but, on the contrary, it deals solely with a *passive* instrument, viz., the conveyance. It is therefore a mere parliamentary declaration that certain results shall flow from the act of the Commissioners. What acts? Is it not their lawful and just acts, viz., those sales which they were authorised to make by the previous sections?

The language of the 27th section confers force and effect on the form of the conveyance prescribed in the schedule to the Act, and also wipes off from the estate of the owner all charges and incumbrances affecting the title. This construction would give to every word in this section a meaning consistent with reason, liberty and justice; but to hold that it confers absolute power would be, not merely an abuse of terms (for it confers no powers whatever), but in effect to expunge the 16th, 17th, 23rd and 24th sections from the Act. Upon this point, *Annesley v. Dixon* (a) is a direct authority. The language of the 25th section of *W. 3, c. 2*, is almost identical with the words of the 27th section of this Act, yet that 25th section was never resorted to in support of the defendant's case. The doctrine established in *Annesley v. Dixon* is this, viz., "that an implication arising from an Act of Parliament shall not be sufficient

(a) Holt R. 372; S. C., 7 B. P. C. 171.

“to divest any man of his legal rights;” and this doctrine is based upon this principle of natural justice, viz., that if a minister of the Crown introduced into Parliament a bill which is intended to invade the rights and the liberties of the subject, he must use language in that bill so clear and unequivocal that his meaning cannot be mistaken. The spirit of the British constitution is to entrust no discretionary powers to magistrates, but on the contrary, to protect each man’s life and property by general and inflexible laws. The constitution will not permit an Attorney-General to pass a bill through Parliament upon the representations that it is one for the sale of “incumbered estates,” and when he has succeeded in making it the law, then to come into this Court and say that the intention of the Legislature was the reverse.

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Secondly, the power of adjudication. This power may be divided into legal and equitable. It is said that the 49th section raises a presumption in favour of the conveyance, which in effect confers the absolute power; the argument is, that upon the evidence of the conveyance alone it must be presumed that the Commissioners held an adjudication upon the defendant’s lease, and that they in fact have decided that it is invalid. It is submitted that this is not the true construction of this section, for it points to two classes of acts, viz., those acts which ought to have been done, and those acts which ought *not* to have been done; the latter class is not expressly mentioned in the section, but the former is, and therefore the irresistible inference is, that when the Legislature by express language confined the presumption to that class of acts which ought to be done, it meant to exclude this presumption from that class which ought not to be done. To sell the defendant’s estate to pay another’s debts, and that too in the teeth of their own adjudication, is an act which, it must be admitted, the Commissioners ought not to do; and if so, this section has no application to the present case.

It is said too that the 15th section confers jurisdiction—that Rorke’s lease being an interest carved out of the inheritance, the Commissioners had jurisdiction over it. No doubt they had, but it is confined to that class of jurisdiction known as their power

E. T. 1857. of adjudication. The Act does not authorise them *to sell* a tenant's  
*Esch. Cham.* interest; on the contrary, it in the most express terms enjoins them  
 ERRINGTON not to do so.—[GREENE, B. What meaning do you give to the  
 v. words "ascertaining the rights of all persons," in the 15th section?  
 RORKE. Suppose the case of a forged mortgage, and the Commissioners to  
 decide that it was a valid charge upon the estate, and to sell, could  
 the owner maintain an ejectment against the purchaser?—He  
 could, provided the Commissioners decided the fact themselves,  
 without sending the case to be tried by a jury; the jurisdiction  
 of the Commissioners was defined by the Act before they were  
 appointed, and to allow them to expand or to contract its limits  
 would be to allow them to alter the law.

By the 23rd section the Commissioners are ordered "to ascertain" the tenancies, and when ascertained, "to sell subject to such tenancies." Suppose the Commissioners had decided that Rorke's lease was invalid, then had he no interest to sell: again, suppose them to decide (as they have done) that it was subsisting, then have they no jurisdiction whatsoever over it, because their powers of adjudication are exhausted, and their powers of sale never attached: *Ellis v. Segrave (a)*.

Suppose the Commissioners to have decided against Rorke's lease, and to have put the plaintiff into possession, the defendant could not maintain an ejectment against him to recover the land, because he is barred by the adjudication; and if so, why should the plaintiff be permitted in this way to set aside that adjudication?

But suppose the Commissioners had power to rescind this adjudication, that power could be exercised only upon proof of fraud. Now, the presumption created by the 49th section can never be held to extend to a presumption *unknown to the law*; for fraud must be proved in every Court, and will not be presumed; and therefore, it lies upon the plaintiff to prove that the Commissioners' adjudication in favour of defendant's lease was erroneous, and that they reversed it by an exercise of their equitable jurisdiction.

(a) 7 B. P. C. 331.

An argument has been founded upon a comparison between the 28th section of the 11 & 12 Vic., c. 48, and the 23rd section of this Act. But does it follow that because the Legislature adopted one mode of protecting the tenant's interest in one statute, and another mode in the other, that therefore Parliament intended to leave him *unprotected*? The defendant here has done everything that *could be done*, to avail himself of the provisions of the 23rd section; and now to tell him that his estate has been swept away from him, is to say that this statute does not contain the 23rd section; for a right without a remedy is a mockery.

The 24th section was inserted in the Act for the purpose of preventing disputes between landlord and tenant, and its language is imperative: *Crisp v. Bunbury (a)*. The Commissioners having decided in favour of defendant's lease, and having advertised the lands to be sold subject to it, were bound, by the stringent terms of this section, to notice it in the schedule to the conveyance; and not having done so, this deed is void *quoad* Rorke's estate.

*Cur. ad. vult.*

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GREENE, B.

In this case the plaintiff claims the possession of the premises in question, under a conveyance from the Incumbered Estates Court, dated in July 1853. It was not disputed at the Bar that these premises constitute a portion of what is conveyed by the deed, or at all events of what is contained in the map annexed to the deed, and by reference incorporated into the deed itself. But the defendant contends that, even assuming that the piece of ground which is sought to be recovered is locally within the description of the property conveyed, yet the *estate* in it, which passed by the conveyance, is not an estate in possession, but only an estate in reversion, inasmuch as he (the defendant) is entitled to the possession of the land, under a lease made to him before the execution of the conveyance, and which lease, although

April 6.

(a) 8 Bing. 394.



E. T. 1857. not noticed or referred to in the conveyance, binds the purchaser  
*Esch. Cham.* who claims under that conveyance. The plaintiff (the purchaser),  
 HERRINGTON on the other hand, says—"I have purchased under the In-  
 v. cumbered Estates Act, and obtained from the Commissioners a  
 BORKE. "conveyance, which, as the Act of Parliament tells me, 'shall  
 "be effectual to pass the fee-simple and inheritance of the land  
 "thereby *expressed* to be conveyed, subject to such tenancies,  
 "leases and under-leases as shall be expressed or *referred to*  
 "therein; but, save as aforesaid, discharged from all former and  
 "other estates, rights, titles, charges and incumbrances what-  
 "soever of her Majesty, her heirs and successors, and of all other  
 "persons whomsoever." The purchaser further says—"The same  
 "Act of Parliament tells me that my conveyance shall not only  
 "have this effect, but shall also be conclusive evidence that every  
 "application, proceeding, consent and act whatsoever which ought  
 "to have been made, given and done *previously* to the execution  
 "of it, has been made, given and done by the persons authorised  
 "to make, give and do the same." Upon the faith of these en-  
 actments he alleges that he has parted with his money, under  
 the conviction that all he had to do was to see that his conveyance  
*purported* to grant what he bought and paid for; and that if it did,  
 he would be under no necessity or obligation to examine whether  
 there were any charges or incumbrances on the property other  
 than or in addition to those which the conveyance itself disclosed,  
 or to inquire whether anything had been omitted, mismanaged,  
 irregular or erroneous in the proceedings before the Commissioners,  
 on whose conveyance he relies.

This, as it appears to me, is the case which, *prima facie*, every  
*bona fide* purchaser, under this Act, is entitled to present. The  
 Act of Parliament may be considered as somewhat in the nature  
 of a bargain or compact between the Legislature and the purchaser,  
 to the effect that, provided the latter do what the Act requires,  
 he shall be relieved from the necessity of doing more. Consi-  
 derations of possible hardship and injustice may be, and in this  
 case have been, urged, arising from alleged errors or miscarriages  
 in the course of the proceedings of the Court, or the acts of

the Commissioners. On the other hand, however, we must not forget that, by depriving a purchaser of the shield which he says the Act supplies to him, it may appear that he will lose property for which he has paid his money on the faith of the statute.

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*Exch. Cham.*  
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The plaintiff here having thus made out his title under the conveyance from the Commissioners, the defendant says that that conveyance operates nothing to affect his lease. The defendant, on the contrary, says—"I admit that the lands in my lease are "included in the conveyance; but I have a right to go behind "that conveyance, and to show that my lease *ought* to have "been saved in it; that the Commissioners ought not to have "conveyed a title in possession, or anything more than a reversion; that, in point of law, they have conveyed no more; and "this I undertake to show by facts and evidence *dehors* the "conveyance, which show that the Commissioners could not and "did not convey an estate in possession."

In support of this case he produced a lease of 1822, made by the owner of the estate to a person named Wilton, and proved an assignment of that lease to himself. This evidence was objected to, and an exception taken to the reception of it. The defendant also gave evidence of the rental in the advertisement of the sale of the lands, and the rental under which, as he says, the plaintiff purchased. This evidence having been also objected to and received, an exception was taken on that ground. The defendant also gave in evidence the notice served upon him by order of the Incumbered Estates Court, and an order of the Commissioners, of the 6th of May 1853, for an exchange of a portion of bog originally sold to plaintiff, for an equal quantity of the Bog of Clunagh next adjoining the lot sold to plaintiff. The LORD CHIEF JUSTICE, according to the exception, told the jury that although the premises in question were within the ambit of the map on the conveyance to plaintiff, and although the lease of 1822 was not mentioned or referred to in that conveyance, yet if the premises in question were demised by the lease of 1822, and that the plaintiff purchased subject to that lease, it will be virtually only a purchase of *the reversion in fee* expectant on that

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lease. This part of the record does not appear to me to be very accurate; but I understand the learned CHIEF JUSTICE to have directed the jury, in point of law, that if the piece of land demised by the lease of 1822 was the same as that contained in the ejectment, the conveyance from the Commissioners passed only the reversion, and not the possession, even though the piece of land were included in the ambit of the map, and that consequently the plaintiff could not recover. The propriety of this direction is questioned by the exceptions, and was affirmed by the opinions of a majority of the Court below. That judgment has been now brought before us for review.

The defendant has contended that the conveyance by the Commissioners has not the effect of defeating his lease, because the Commissioners ought not to have, and in point of law could not have, affected it. His Counsel relied upon two grounds—first, that the Commissioners acted *without jurisdiction*, so far as his lease is concerned, inasmuch as they could only sell and convey an estate which was incumbered, whereas *his* estate, viz., the lease, never was in point of fact incumbered; and secondly, that assuming there was jurisdiction, yet that it was illegally and improperly exercised, because the validity of the lease was adjudicated upon, and after that, the Commissioners could sell only subject to the lease thus affirmed; so that their act in conveying the property discharged of that lease was *ultra vires*, was an excess of the statutable power conferred upon them, and was consequently inoperative. These, so far as I have been able to collect from the argument, were the grounds upon which it was insisted that no estate in possession in the lands in controversy passed by the conveyance to the plaintiff.

Let us proceed to consider these two propositions. It is said that if there be no incumbered estate, there can be no jurisdiction—that the existence of an incumbrance is a condition precedent to the existence of any authority on the part of the Commissioners; and it is asked, could the Legislature have intended that the property of one man should be sold to pay the debt of another? To this I answer, that I have no doubt that the Legislature did

not *intend* any such thing. But it is a very different question, whether the Legislature did not intend to create, and whether they have not created, for certain purposes, and in order to achieve a great object of public policy, a tribunal whose acts, within certain limits, should be indefeasible, even at the *risk* of working possible injustice in some cases, from the inevitable fallibility of the persons to whose acts the indefeasible or conclusive character was to be attached? If the whole purview and construction of the statute show that the acts done were intended to have that character, it is vain to say that they can be defeated by an allegation, or even by proof, that in any particular instance there has been hardship, or even injustice, caused by the miscarriage of those who have done them.

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In order to form a correct opinion in the present case whether any jurisdiction existed, it is necessary to remember what it is which the Commissioners have dealt with in their sale and conveyance to the plaintiff. It is a *fee-simple estate*—the *land*—which, in the contemplation of the Act, means the *fee*. The plaintiff here relied, in the first instance, as he was entitled to do, simply upon his conveyance. It was on the defendant's part that the evidence was given which, as it is alleged, negatived the jurisdiction. Now, what part of that evidence disproved the jurisdiction to sell and convey *the fee-simple* of these lands? None. The very evidence of the defendant itself showed that that fee-simple estate was incumbered, and that a petition was presented for the sale of it; that is to say, it showed that the Commissioners had jurisdiction to take cognizance of the subject. In truth, the defendant's case is, not that the Commissioners had no power to convey at all, but that they had no power to convey *discharged of the defendant's lease*; in other words, that they had power to convey, and did convey, *the reversion* expectant on that lease; but could not, and did not, convey the land *in possession*. It appears to me that it is utterly impossible to argue in this case upon the supposition that the Commissioners had *no jurisdiction at all*. The importance of this will, I think, presently appear.

Before I proceed further, I shall refer to the case of *Annesley*

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v. *Dixon* (a), which has been strongly relied upon by the Counsel for the defendant. The sole question in that case was, not as to the conclusive or binding nature of the act of the trustees, supposing them to have had jurisdiction, but whether they had any power to deal with the lands at all. It was held that their authority was confined exclusively to the classes of estates vested in them by the Act of 11 & 12 W. 3, c. 2, which of course must be limited by the description in the Act itself; and that was restricted to estates of persons, first, "who *stand convicted or attainted* of treason since the 13th of February 1688; or (secondly) "who shall be *convicted or attainted* of any such treason by or "before the last day of Trinity Term which shall be in the year "1701; or (thirdly) who *stand convicted or attainted* of high "treason *by reason of being found by inquisition* to have died, or "been slain in actual rebellion since the 13th of February 1688 or "at any time since; or (fourthly) whereof King James the Second, "or any in trust for him or to his use, was seised, or possessed "or interested in at the time of his accession." No lands by name are vested in the trustees. Of the four classes of lands specified in the Act, three must have been the subjects of solemn inquiry and recorded adjudication before they could vest. Unless there had been conviction, attainder, or inquisition, the Act did not apply at all. So with respect to the last class, namely, lands alleged to have belonged to King James, lands must have in *fact* been his before the Act could apply to them. In the case of *Annesley v. Dixon*, the property in question fell within the last class. Now that case came on upon a special verdict, and what was the fact found by the verdict? That in truth and fact King James *never had, nor had anybody to his use, any estate, right or title whatever* in or to the disputed premises. With respect to the preliminary fact, all parties were bound by this finding; and then the question was, whether, under an Act of Parliament which vested in trustees such estates only as belonged to King James, the conveyance of those trustees could pass estates which, it was found by the verdict, did *not* belong to him? There could

(a) Holt's Rep. 372; S. C., 1 Bro. P. C. 171.

be but one answer to such a question. The attempt made was to show that under the Act the trustees were empowered to decide whether any particular property was vested in them. There were, however, in the opinion of the Court, no words in the Act which could be so construed. It was held that all the powers of inquiry and adjudication conferred by the Act depended upon a *previous vesting in them under the Act*, which again depended upon a matter of fact existing at the passing of the Act, into which they could have no power to inquire, because their acting at all involved the assumption of that fact, the non-existence of which would render everything *coram non Judice*. I do not understand, from the report of the case, that anything like *this* was decided, viz., that if the trustees *had* jurisdiction, their conveyance would not have passed an indefeasible title.

And accordingly, in order to bring the present case within the range of the decision in *Annesley v. Dixon*, the learned Counsel for the defendant has been compelled to assert that the Commissioners of the Incumbered Estates Court exceeded their jurisdiction, and acted without authority in conveying the lands in question, discharged of the lease. This renders it proper to look to what the Legislature have done in conferring jurisdiction by the Incumbered Estates Act. Now, what are the things, the existence of which, as it is *confessed*, will give jurisdiction? An estate in fee-simple, or of a lesser duration specified in the Act—an incumbrance of a certain character upon such an estate, and an application to the Court by the owner of the estate or of the incumbrance for a sale. The 49th section, unless it is to be expunged from the Act, is at all events to be considered as making the conveyance evidence of the last of these three requisites, viz., the making of the application by the proper person. Then with respect to the other two, what are the words of the 15th section?—[The learned Judge read that section.]

Let us examine the meaning and the effects of these enactments. The Commissioners are created a Court of Record, and invested with “all the powers, authority and jurisdiction of a Court of “Equity in Ireland, for the investigation of title, and for *ascertain-*

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E. T. 1857. *Exch. Cham.* "ing and allowing incumbrances and charges, and the amounts due thereon." I stop here, and ask, would a Court of Equity have jurisdiction, on a bill filed by an incumbrancer for the sale of an estate, to inquire, determine and adjudicate whether the estate was subject to the charge? Would a Court of Equity have jurisdiction, in case of a bill for a sale, to investigate the title of the defendant? Would it have jurisdiction to decide in favour of that title? If all these questions must be answered in the affirmative, then have the Commissioners jurisdiction to investigate and determine whether the demand stated in the petition subsists in fact, or is valid in law? and whether the estate on which it is charged was or is the property of the person who created the charge? Observe, the words are, "*ascertaining and allowing incumbrances and charges, and the amounts due thereon.*" The latter words show that by the former something more than the amount is to be determined, namely, the existence and validity of the charge or incumbrance or incumbrance itself. But not merely this—the Court is empowered to exercise the jurisdiction of a Court of Equity for settling the rights of owners and others, and generally for ascertaining, declaring and allowing the rights of *all persons* in any lands or lease in respect of which application may be made. Like powers are given to enforce, rescind or vary any contract for sale made under the Act, and in other matters incident to or consequent on a sale under the Act; and the Commissioners are further authorised, though not bound, to inform themselves in matters of law, by taking the opinion of a Court of Law, and in matters of fact, the opinion of a jury.

It appears to me quite impossible to say, in the teeth of these enactments, that when a petition has been presented to them for a sale, the Commissioners have not jurisdiction to decide and determine, *proprio vigore*, whether they may in point of fact and of law proceed to a sale. They have, therefore, the very powers and jurisdiction which it was held in *Annesley v. Dixon* were *not* conferred by the statute of W. 3. I was a good deal startled at hearing it argued in this case that the Commissioners had no authority to *take cognizance* of this matter at all; because

if so, the conveyance to the plaintiff was wholly inoperative, and passed nothing whatever to him, although confessedly it did transfer an estate *in reversion*.

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If, then, it must be conceded, as I think it must, that the Commissioners were not mere intruders and usurpers in this case, and that they had a right to take proceedings for the purpose of selling, and to sell and convey, the estate in fee-simple of the Bog of Allen, of which the premises in question are a portion, what does the case of the defendant amount to? To this, and to no more, that the Commissioners erred and miscarried in the execution of their duty, because they ought to have conveyed that fee-simple (which in some way or other they had a right to convey) not in the manner in which they have conveyed it, viz., free from any lease to the defendant, but in such a manner as to have upon the face of their conveyance referred to and saved that lease; so that we are called upon to say, not that this whole proceeding was *coram non Judice*, but that being *coram Judice*, the Judge did that which he ought not to have done. In my humble judgment this is what no individual can allege, and no Court can decide, as against a purchaser, under this Act of Parliament. To assert the contrary is, in my opinion, to repeal the express provisions and defeat the whole policy of the Act.

I am here speaking generally of the alleged right of a lessee or other person to set up some supposed miscarriage or error of the Court, for the purpose of impeaching its conveyance. I shall presently advert to the particular case of lessees whose rights are provided for under the 23rd section, which case has been viewed as a sort of exception to the general rule of jurisdiction, even admitting that such a general rule exists. But, as an abstract proposition, it appears to me that, to allow any person to impeach the title of a purchaser to land expressed to be conveyed to him in fee-simple, upon the ground that any incumbrance, charge, lease or liability, which ought to have been saved, or reserved or excepted in that conveyance, has not been noticed in it, and that in that respect the Commissioners have been guilty of an error or a breach of duty, is in direct contraction and *annulment* of the language



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of the Legislature ; it is to say that an estate, which the Act expressly provides shall be free from all burthens not appearing on the face of the instrument handed to the purchaser in exchange for his money, shall nevertheless be subject to any burthen, which, although *not* so appearing, may thereafter be shown to have been fastened on the estate before that conveyance. It is further to say that although the Legislature has enacted that the instrument thus handed to the purchaser shall be conclusive evidence that everything has been done that would be necessary to warrant the Commissioners in conveying the estate which they profess to pass, that instrument shall *not* be conclusive evidence to that effect, but that any person who shall afterwards be able to show that something was omitted which ought to have been done, or something was done which ought not to have been done, shall be at liberty to re-open everything, and that the conveyance which was to have the effect of barring all rights inconsistent with the purport of it shall not have that effect, but shall be nullified or modified according to the result of a suit to be instituted by that person.

It must, I think, be admitted that this proposition, in its full extent, is not maintainable ; if not, what line is to be drawn ? To what extent is the purchaser's deed to shield him, and in what cases or to what extent is it to fail ? Let us suppose that this defendant's lease had never been noticed at all ; would the omission entitle the lessee, after a conveyance, to eject the purchaser ? I do not think that that could be asserted. It would be like any other charge on the land which the Commissioners neglected to specify. But what is that to the purchaser ? Again, let us suppose that the lease has been under the cognizance of the Commissioners, and pronounced invalid—there again, I suppose it will be conceded that however illegal or unjust such a decision might be, the purchaser could not be affected by that lease, if not mentioned in his conveyance. In short I do not see how a purchaser can be visited with any mis-execution of the duties of the Commissioners, unless he may be so by every mis-execution of them. The line can nowhere be drawn ; and if this be so, what is the use or meaning or efficacy of the 27th and 49th sections of this Act ?

I must now address myself to an argument derived from the 23rd and 24th sections of this Act. That argument, as I understand it, is this:—that according to the provisions of the 23rd and 24th sections, and regard being had to a fact which appeared upon the trial, the Commissioners had no legal capacity to grant or convey to Mr. Errington an estate, as they professed to do, absolute and unincumbered, but only an estate subject to the lease; so that their conveyance, though absolute on the face of it, yet passed only the reversion, just as it would have done had the word reversion been used in it, or the defendant's lease specified or copied in it. This view of the case, as I collect, received some countenance in the Court below. It is founded, as I understand it, upon the following reasoning, viz., that it now appears from the rental under which the plaintiff purchased, that the owner's estates were to be sold subject to this lease; that thereby a sale was made to the plaintiff, on the condition that he was to take subject to that lease, or, at all events, that a contract or agreement for a sale on that condition was made between him and the Commissioners; that this was an adjudication by the Commissioners that that lease was valid; that after the adjudication the Commissioners were *functi officio*; that it does not appear that this adjudication was rescinded; and that under those circumstances the Commissioners could not convey to a purchaser, unless subject to this prior adjudication; that their hands were tied up by it; and that in effect their subsequent conveyance was a mere ministerial act which could only operate to carry out their unrevoked adjudication.

The sections relied upon to support this argument are, as I have stated, the 23rd and 24th.—[His Lordship here read the provisions of the 23rd section.]—There can be no doubt that when the Commissioners have ascertained that there are any leases affecting property to be sold, it is, *prima facie*, their duty to sell, subject to such leases; nor can there be any doubt that under the 24th section the conveyance ought to express or refer to such tenancies as may ultimately have been determined by the Commissioners to be charged on the estate to be conveyed. But that, as it appears to me, cannot govern the decision in this case. Assume such is the

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E. T. 1857. duty of the Commissioners, and that their recognition of a lease  
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But further, supposing that the Commissioners put forth a rental, stating that they intend to sell subject to a certain lease, I am not prepared to assent to the proposition that this is an adjudication by them, affirming the validity of that lease, so as to terminate their authority, to render them *functos officio*, and disable them from afterwards conveying discharged of that lease. Nay more, I do not mean to admit such a proceeding to be an adjudication at all, in the proper sense of that term. The rental is a mere statement of the mode in which the Commissioners intend to dispose of the property; it is not binding upon them or anybody else, if they choose to vary from it, as I conceive they may do. The rental, in this case, is a mere advertisement or notice of an intended sale, on certain terms. It cannot be pretended that the actual sale, made many months afterwards, may not be made on some different terms, to be arranged between the Commissioners and the purchaser. But even if the rental could be treated as a solemn order, partaking of the nature of a judicial decision, the Commissioners would have, under the 51st section, ample power to rescind, vary or alter it; and their conveyance, if inconsistent with it, would, *per se*, and for that very reason, as it appears to me, amount to a rescission or variation of it. The Commissioners are not, in my opinion, *functi officio* as to an estate, by selling it, nor do their powers with respect to it cease until they have actually conveyed it to a purchaser.

But another view of the effect of the 23rd and 24th sections has been suggested, which is entitled to the most respectful consideration; and that is, that the efficacy of the 27th section is controlled by the word "such;" that is to say, that no conveyance is within

it except the conveyance referred to in the 23rd and 24th sections. This view, I believe, is sanctioned by the authority of a most distinguished Member of this Court—one to whose opinion I have been accustomed always to pay, I shall not say the greatest respect, but the highest deference; so high, indeed, that in a case where my own conscientious convictions were not clearly and decidedly to the contrary, I should be disposed to yield them to his great and justly influential judgment. It appears to me that the word “such,” in the 27th section, cannot with propriety be said to have the effect attributed to it, namely, to restrict the operation of the 27th section by reference to the 23rd and 24th, so as to limit *the authority to convey* in cases of leases or tenancies, to a conveyance *subject to leases* ascertained under the 23rd section. This construction, in effect, amounts to a *denial of jurisdiction*, and so I understand it to be offered.

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Now, first, I am disposed to say that the word “such” may fairly and properly have reference only to the 24th section, which is the last preceding one, and may have been intended to give efficacy to a conveyance executed in the manner pointed out by that section, viz., by two of the Commissioners only, *without the execution of any other party*. An enactment for that purpose would be proper, if not absolutely necessary, as otherwise doubts might have been entertained, whether an execution of the deed by all parties might not be necessary, as in sales in the Court of Chancery, or, at all events, an execution by the whole three Commissioners.

But independently of this (as it appears to me) natural explanation of the word “such,” and assuming it to refer to the 23rd as well as to the 24th section, yet to give it the effect of cutting down the operation of the conveyance itself, by the introduction of a lease recognised or acted upon under those sections, but not ultimately and expressly referred to or noticed on the face of the conveyance, is to trench upon the safeguard provided for a purchaser; it is to admit that what the conveyance *purports* to do may be affected by something anterior, which disabled the Commissioners from conveying; it is to defeat the policy of the Act, to break down the barrier provided by it for the purchaser; and, for the

**E. T. 1857.** reasons already adduced, I think such a construction of the 27th  
*Exch. Cham.* section as I am now dealing with cannot be admitted, consistently  
**ERRINGTON** with its obvious intention and its express language.  
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According to my view of the operation and effect of the 27th and 49th sections of the Act, there having been in this case jurisdiction clearly to sell and convey the fee-simple, no evidence ought to have been received for the purpose of showing that the conveyance ought to have been of a reversion instead of an estate in possession, on the ground that either there was in fact an outstanding lease, or that it so appeared or was adjudicated in the course of the proceedings in the Incumbered Estates Court. I think, therefore, that the exceptions to the reception of evidence which were taken in this case must be allowed.

It was attempted, in argument, to construe the word "ought" in the 49th section, as meaning to relate to such acts, proceedings, matters and things as it was the duty of the Commissioners to have done in the due and proper exercise of their jurisdiction; and therefore, that as they *ought not* to have conveyed discharged of the lease, after having declared it to be subsisting, their having done anything inconsistent with such declaration is not evidenced under the 49th section by the conveyance: but this is clearly a misunderstanding of the section. It clearly means that the conveyance shall be conclusive evidence that everything has been done which ought to have been done, or would be necessary, in order to entitle the Commissioners to execute the conveyance which they have executed.

In the Court below, it appears to have been considered that this case was, from its peculiar circumstances, an exceptional one, and that it was possible to decide it in favour of the defendant, without trenching upon the vital and important abstract principle that a purchaser under the Act may protect himself from all claims and incumbrances simply and solely by his conveyance. I must confess that I cannot discover anything in the case of that exceptional character. I can see nothing in the facts of this case, or in the reasoning urged against the purchaser, which would preclude the application of a decision for the defendant to any

other case in which an attempt might be made to go behind the conveyance. I see no line which can be drawn to exclude such a conveyance.

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It is no doubt easy to suppose cases in which the conclusiveness of the purchaser's title may inflict a wrong. Whether such is the case in the present instance, I have no means of knowing. I cannot tell whether the defendant may have received compensation for his lease, either in money or by other land. I am bound to presume, and I do presume, that the Commissioners had good grounds for thinking, and did think, that they were doing no injustice to this defendant in not ultimately establishing the lease against the purchaser, although they at one period contemplated doing so. To relax the security intended to be given by the Act to purchasers, upon an allegation of hardship or injustice, the truth of which we have no adequate means of ascertaining, would be most dangerous. Nor are we to forget that, by attempting thus to remedy the *possible* wrong which may be alleged to have been done in one instance, by holding the conveyance to a purchaser conclusive, we inflict a *clear* and *certain* wrong upon every innocent purchaser, whose money has been taken from him on the assurance held out to him by the Legislature, that he is safe from all assaults upon his title—I say *every* purchaser, because the security of every purchaser's title is endangered by overruling the principle that his deed alone shall establish his title against all mankind.

To say that this defendant's property has been conveyed in this case to pay the debts of another is really, when we come to consider it, a *petitio principii*. The question is—are we to say that anything was conveyed which was not the property of the *debtor*? The Act has made the Commissioners judges of that matter, *for the purposes of this particular* Act of Parliament. Suppose after all the inquiries which the Commissioners can make—after taking the opinion of a Court of Law upon the construction of a will or deed—after obtaining the verdict of a jury upon a question of fact, they sell and convey, and a person who was supposed to be dead comes forward and offers to prove a clear title in

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himself, I do not suppose he would be listened to. Many other cases of a like nature might be put. I am at a loss to understand how this lease can now be set up against the absolute grant in fee, unless other claimants are also to be admitted to show that the Commissioners have miscarried in the execution of their functions. The House of Lords may make an erroneous decision, the effect of which may be to give one man's estate to another. The answer however is, that it is *not* the estate of the man said to be injured, when a tribunal of conclusive jurisdiction has *declared* that it is not: and so here, this lease is not the property of the defendant, when the Act and conveyance of the Commissioners has declared that it is not.

When I speak thus, I must, of course, be understood with reference to the facts of this case, in which we are dealing with incumbered land, admitted to have belonged to the person for the payment of whose incumbrances it was sold.

It appears to me that in this case the Commissioners had clearly jurisdiction—that the alleged miscarriage, in not having conveyed subject to the lease, supposing it to have occurred, cannot be set up to defeat the purchaser's rights—that it is not competent for us to enter into the inquiry whether the Commissioners did or did not act properly in conveying as they did—that consequently the evidence objected to ought not to have been admitted—that the exceptions ought not to have been allowed, and that a *venire de novo* should be awarded.

JACKSON, J.

I think it necessary to say a few words on the principal question in this case, merely as to the effectual and conclusive character of the conveyance by the Commissioners, and the indefeasible quality of the estate thereby conveyed to the purchaser; and I do so because of the opinion expressed by me in *O'Donnell v. Ryan*, in the Court of Common Pleas.

I assume that the 20 acres in question in this case are part of the estate of Mr. Hamilton, which was the subject of the sale, and also that they are comprised within the 177 acres conveyed by the

instrument of 29th July 1853. It is admitted that there was an incumbered estate, and a petition by an incumbrancer to the Incumbered Estates Court, praying a sale. No question therefore exists as to the jurisdiction. Then there is a conveyance by two of the Commissioners, under the seal of the Court; this is the mode of conveyance prescribed by the 24th section of the Act. The 27th section enacts that every *such* conveyance *executed* as *aforesaid* shall be effectual to pass the fee-simple and inheritance of the land thereby expressed to be conveyed, subject to such tenancies, leases and under-leases as shall be expressed and referred to therein; but save as aforesaid, and as hereinafter provided, discharged from all former estates, rights, titles, charges and incumbrances whatsoever, of her Majesty and of all other persons. Now, no tenancy or lease or under-lease is expressed or referred to in this conveyance of 29th of July 1853. It is therefore an effectual conveyance of the fee-simple in possession, discharged of the lease of 9th of March 1822, and of all other charges and incumbrances, by the express terms of the 27th section.

It must be admitted to be a very despotic power which has been conferred on the Incumbered Estates Court, and perhaps it justifies the strong and energetic language of my Brother MOORE, in his very able judgment in the Court of Queen's Bench. I certainly did myself feel the monstrous hardship and injustice of selling the estate of one man to pay the debts of another, and that, without providing any means of redress, or of compensation for the injured party; and I confess that the force of this objection led me to doubt that such could have been the intention of the Legislature when creating the Incumbered Estates Court. I have never, however, doubted the competence of Parliament, if they considered that the public interest and welfare required it, to create a Court with power to adjudicate contrary to the course and spirit of the Common Law, and in violation of the just rights of individual subjects of the realm. No doubt, particular interests must give way to the public good; but this would not absolve the Legislature from the duty of providing compensation from

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the public purse for the individuals whose rights and interests were thus invaded and sacrificed, in furtherance of a great national object, a duty which, I trust, may yet be performed. When the case of *O'Donnell v. Ryan* was before the Court of Common Pleas, I was also influenced by the established rule, that the jurisdiction of the Superior Courts of Justice cannot be ousted without express and distinct enactments to that effect; and I then thought that if such were the intention of the Legislature in passing the Act, they had not expressed that intention, nor had they used language which would necessarily imply it. However, it is my duty now to state that I am fully satisfied, upon a careful consideration of the Act, and of the able arguments addressed to this Court, that it was intended by the Legislature to invest the Incumbered Estates Commissioners with this despotic power; and I am of opinion, that two of the Commissioners having executed the conveyance of the 29th of July 1853, in the form and manner prescribed by the Act, the title of the plaintiff under it is indefeasible.

I shall now say a word as to the principal objection made to this construction of the Act. It is said the 23rd section was inserted to secure tenants, and that accordingly it directs the Commissioners to ascertain the tenancies of the occupying tenants affecting the lands to be sold; that the Commissioners did so in this case, and that, having done so, they were bound to sell subject to the lease of 9th of May 1822. Now, observe the terms of the 23rd section, and also of the 24th. By the 23rd, "The Commissioners shall, *where and so far as they shall deem necessary* for the purposes of such sale, ascertain the tenancies, &c., "and the sale shall be made subject to the tenancies ascertained "as aforesaid." The 24th section provides that, when the Commissioners make an order for sale, the lands shall be sold *generally in such manner as the Commissioners shall think fit*, and the conveyance shall *express or refer* to the tenancies, leases, &c. (if any), subject to which the sale is made. These sections appear to confer on the Commissioners a discretion to be exercised by them as to the cases in which, and the extent to which, it may be necessary

to ascertain the tenancies for the purposes of such sale, and also to determine, in each case, whether they should sell subject to, or discharged of, any given lease or tenancy: and, consequently, whether any particular tenancy or sale should be expressed or referred to in the conveyance; and I see nothing to limit the exercise of that discretion as to time, up to the very moment of actual sale and conveyance: and, observe, the 56th section enables the Commissioners to rescind any order they may have previously made. I would ask, would not the 24th section enable the Commissioners, if they thought it right, to sanction an arrangement between the owner and tenant, that compensation should be made in respect of the lease, and that a consent should be entered into for that purpose, and that the lands should be sold discharged of the lease? And may we not—perhaps I might say are we not, bound here, under the 49th section, to presume that some such arrangement, consent, proceeding or act, which would warrant the conveyance, has been made, given or done by the persons authorised to make, give or do the same, before this conveyance was executed? And, as to the argument pressed on us, with reference to the conflict between the order ascertaining the existence of the lease of 9th of March 1822, and the conveyance by the Commissioners, it appears to me to be a sufficient answer to say that, if necessary, we should presume that, before the execution of the conveyance, the Commissioners rescinded the order ascertaining the lease, and made another order before they executed the conveyance, as they had power to do under the 51st section. But it has been argued, against the effect of the 49th section, that it does not validate the conveyance in case of any substantial miscarriage, that it only applies in cases of mere informality. I think it quite impossible so to construe the 49th section. The last clause of it, which is relied upon for this argument, was, as I conceive, plainly added in order that no *mere* informality should prevent an instrument executed, in pursuance of the provisions of the Act, by two Commissioners, under the seal of the Court, from having the conclusive effect given to it by the previous clause of the section.

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E. T. 1857. On the whole, then, my opinion is, that the judgment of the  
*Esch. Cham.* Court of Queen's Bench ought to be reversed.  
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The plaintiff's right to have the benefit of the sale made to him by the Incumbered Estates Commissioners has been encountered by a variety of objections more or less formidable, but mainly resolvable into the injustice which would be done to the defendant, if the plaintiff should succeed in recovering the lands in this ejectment discharged from the defendant's lease. It is from this circumstance inferred that it could not have been the intention of the Legislature to produce such a result; and it is relied on accordingly that the statute should be so construed as not to give occasion for it, unless it be found to contain language admitting of no other possible construction. Now, in my judgment, the language of the statute, contained in the several sections which have been referred to, is plain and unequivocal, and admits of no construction but the one, viz., that the conveyance to the plaintiff from the Commissioners has given to him the fee-simple of the lands, discharged from the defendant's lease.

But, to advert somewhat more at large to the objection, it is asked, could the Legislature have intended to enact anything so unjust as that a tenant should be stripped of his property through the instrumentality of the Incumbered Estates Court, without being afforded any compensation, or any means whatever of redress? To this inquiry the answer is plain and simple, that the Legislature intended no such thing; but, on the contrary, intended the reverse. The provisions of the Incumbered Estates Court Act, and more especially the extensive powers conferred by it on the Commissioners, have been made the subject of invective at the Bar, and terms almost opprobrious have been used in the discussion of a purely legal question; but can the circumstances under which this tribunal came into existence be forgotten? The Legislature, in creating the Incumbered Estates Court, did so deeming it a necessary evil. Such was the condition of a large proportion of the landed proprietors of Ireland at that period, with their estates all

but unsaleable, from the amount and complication of the incumbrances affecting them, that it had become absolutely necessary to resort to proceedings quite undefensible under ordinary circumstances; accordingly, the Legislature framed a measure calculated, as was believed, for the attainment of the desired object, by facilitating the sale and transfer of incumbered estates to a class of new proprietors. In framing this statute, they provided, by every available means which legislation could afford, against the risk of such injustice occurring to lessees and others, as is complained of in this case; keeping in view, at the same time, the object announced by the title and preamble of the statute, viz., to facilitate the sale and transfer of incumbered estates. For this purpose, the utmost care and caution appear to have been exercised by the framers of the Act, in the several sections which have been referred to, to secure the interests of lessees, when the estates of lessors should come to be sold by the Commissioners. But when it is asked, why did not the statute provide against the possibility of mistakes being made in carrying out its enactment? the answer is supplied by the impossibility of constituting a tribunal (such as never existed upon earth) which should never be liable to fall into error. And if, again, it is asked, in case of the mistake being committed (such as has occurred in this instance), of selling an estate discharged from a lease, when the sale should have been had subject to it, why should the lessee, who has been in no manner of default, or to blame in the transaction, be stripped of his property, and the purchaser be saved harmless? the answer is, that if it were not so, the statute would utterly defeat itself; for who would purchase in the Incumbered Estates Court, if the lands, for which he had paid his money and obtained his conveyance, were liable to be taken from him, in the event of the Commissioners having made some slip or mistake in their proceedings? for, recollect, a purchaser in the Incumbered Estates Court (unlike the Court of Chancery in this respect) has no means afforded him of ascertaining the regularity or validity of the proceedings to a sale; he goes into the Court, bids for the estate, is declared the purchaser and obtains his conveyance; and beyond this, he is not

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empowered to interfere in the matter. Then can it be supposed that the Legislature, in framing this Act, intended (as its title and preamble announce) "to facilitate the sale and transfer of incumbered estates," could have meant to do so, by inviting persons to purchase, and then leave them at the mercy of any accident, whereby irregularity or error might occur in the proceedings of the Commissioners, over which the purchasers could exercise no control? There can be no difficulty in pointing out instances wherein the proceedings of the Court may, by possibility (through mistake or abuse), be productive of injustice or loss to lessees or incumbrancers, and for which the statute affords no means of redress. Such, however, are exceptional cases; and, it must be borne in mind, that laws are framed for the ordinary requirements of society, and not for exceptional occurrences, which, either from not having been foreseen at the time, or not having been capable of being met consistently with the paramount object of the Legislature, have been left unprovided for by the statute.

Then what is the plaintiff's title to recover in this action? Simply his conveyance of the lands from the Commissioners, without any mention therein of the defendant's lease, as directed by the 24th section of the Act, and consequently, by the express enactment of the 27th section, discharged therefrom. But objections are made, going behind this conveyance from the Commissioners; and irregularities are pointed out in the proceedings to the sale. It is relied on that, in point of fact, the lands in the defendant's lease were never actually sold by the Commissioners, and consequently should not have been included in the conveyance; and other irregularities are suggested, of the like import. But to this and all such objections, the ready answer is afforded by the 49th section, whereby every conveyance from the Commissioners is enacted to be, "for all purposes" (not evidence, but), "conclusive evidence that every application; proceeding, consent and act whatsoever, which ought to have been made, given or done previously to the execution of such conveyance, has been made, given and done by the persons authorised to make, give and do the same." But furthermore, the decision of the Court

of Exchequer, in *Rutledge v. Hood* (a), is upon the very point, and establishes that the question in these cases is not whether the proceedings were regularly conducted or not, but whether the Commissioners had jurisdiction to act in the matter? "This was clearly a case," says PENNEFATHER, B., "within their jurisdiction; they had an estate of inheritance to sell, and an incumbrance affecting or purporting to affect that estate, and it was their province to determine whether or not that was a subsisting incumbrance; and their decision upon that point is not to be questioned by any other Court, or in any manner whatever." No matter what their decision may have been, right or wrong, as to the substance of an incumbrance, a conveyance, executed by any two of them, says PENNEFATHER, B., gives a good title against all the world.

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It has been objected further (though my Brother MOORE, in his judgment below, considered that the position was not maintainable), that the terms of the conveyance from the Commissioners did not necessarily import the grant of an estate in possession; and it was thence inferred that it was open to the defendant to show that his lease was a subsisting interest when the conveyance was executed, and consequently that an estate in reversion only, and not in possession, passed thereby to the purchaser: to all of which the 27th section affords an answer; for if, as enacted by that section, "every conveyance executed by the Commissioners shall be effectual to pass the fee-simple and inheritance of the lands thereby expressed to be conveyed, subject to such leases, &c., as shall be expressed or referred to therein, but discharged from all other estates, right and title whatsoever," it follows that, as there is no lease whatever expressed or referred to in this conveyance, the lands passed to the plaintiff discharged from all leases; and consequently an estate of inheritance in possession, and not in reversion, vested in the plaintiff by virtue of the conveyance.

Without adverting in detail to the other objections, every one of which is met by some one or more of the sections of the Act, I

(a) 3 Ir. Com. Law Rep. 467.

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will repeat, as I began, that the policy of the Incumbered Estates statute, and its *declared* object, being to encourage purchasers by facilitating the sale and transfer of incumbered estates, that policy must, in my judgment, be held paramount in the construction of the statute; and if the interests of lessees or others (notwithstanding all the appliances and means provided by the Legislature for their protection) shall (as in the present instance) be found irreconcilable with the rights of purchasers, the latter must prevail, and the purchaser must hold, in its complete integrity, the property which has been conveyed to him by the Commissioners.

I therefore am of opinion that the judgment of the Court of Queen's Bench ought to be reversed.

RICHARDS, B.

The plaintiff in this case is a purchaser of land sold in the Incumbered Estates Court. It is not, I believe, disputed, at least it was not seriously questioned in the Court below, that the land conveyed to the plaintiff by the Commissioners comprises the *locus in quo* for which this ejectment has been brought; indeed the map annexed to the conveyance puts that matter out of all doubt. The defendant, however insists that the plaintiff has no right to recover what he seeks in this action; for he says that he (the defendant) holds the *locus in quo* under a lease made to him by the owner of the land, bearing date the 29th of March 1822, being long prior to the conveyance from the Commissioners, which is dated 6th of May 1853. In the conveyance from the Commissioners, no mention is made of the defendant's lease; on the contrary, the land is manifestly conveyed, or intended to be conveyed, to the plaintiff in fee-simple *in possession*, and, of course, discharged altogether of the defendant's lease; and thus the question between the parties is brought to this short point, viz., whether the Commissioners had power to convey the land in the manner expressed by their conveyance? And that being in fact the only point in the case, I should not think it necessary (if it were not that the judgment below has been against the plaintiff) to do more than to read some half dozen sections out of what has been called the Incumbered Estates Act,

viz., the 12 & 13 *Vic.*, c. 77; and so doing, and calling particular attention to the 27th and 49th sections of that Act, I should rest satisfied, without occupying public time by assigning other reasons in sustainment of the opinion which I have formed in this case; but, in deference to the opinions entertained and expressed by others in the Court below, I feel bound to go a little more fully into the subject.

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With regard to some topics, which I consider rather of a popular than a legal character, but which have been very strenuously pressed upon the Court, I do not propose to say much. We have more than once heard of the flagrant injustice of investing any tribunal with a power to sell and convey one man's estate to pay another man's debts; and other such like extreme views have been pressed in the argument. For the satisfaction of the public, however, and of this Court, I may possibly be allowed to state (having been myself a Commissioner of the Incumbered Estates Court), that the Judges of that Court do act in the very opposite way to that supposed or suggested in the argument; they consider it their duty, as assuredly it is, most scrupulously to look into the title of every estate that is brought before them, and to sell no estate but the estate of the right party. I admit, however, that the Commissioners, with all their care and caution, may err in their judgment, like all other human tribunals; but wherever there is an error or mistake in the sale of an estate, whether in Chancery or in the Incumbered Estates Court, or elsewhere, one innocent party must suffer; this cannot, in the nature of things, be prevented.

Suppose an estate is sold in Chancery for £100,000, and that the purchaser, and those acting for him, take all the care in their power to see that he has got a good title, he may nevertheless have his title impeached at a subsequent period, and may find that with all his care he must surrender up his bargain. In vain he goes to the Court of Chancery for his £100,000; that is all gone; it has been applied to pay the debts of the defendant in the cause, who had been the assumed owner of the estate. If that be not selling one man's estate to pay the debts of another, it is certainly



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taking one man's money (which was as good to him as his estate) to pay another man's debts. Suppose again that a will is proved, and probate granted, and that the executor named therein sells a chattel interest of the deceased, worth £50,000, say a term of 1000 years, and distributes the proceeds; and suppose that subsequently a later will turns up, of which probate is duly granted, the former probate being recalled, there it is the rightful owner of the estate who loses his property, and he loses it just as irretrievably as if the sale had taken place in the Incumbered Estates Court, instead of by private contract with the first executor; but the purchaser in that case is all safe, and he is made safe by the general law of the land, and without the aid of the Incumbered Estates Court. Some may think that it is the vendee who ought to bear the loss whenever a mistake occurs, he being bound, on the principle of *caveat emptor*, to take care of himself. Others think that, with regard to judicial sales, a Court (or tribunal, if that name be preferred) might be constituted, which, by great care, and with proper guards, and being invested with very large powers in respect to the investigating of titles, might be safely trusted with a jurisdiction such as that claimed for the Incumbered Estates Court, and that it would be conducive to the public interests that such a jurisdiction should exist.

Without, however, taking upon myself to express any opinion in the abstract upon so purely speculative a question, I would take leave to observe that, at the time of the passing of the 12 & 13 *Vic.*, the landed property of Ireland was in a very lamentable state, and the unfortunate persons who had charges and incumbrances upon property so circumstanced were, many of them, in as helpless and destitute a condition as can well be imagined, unable to get either the interest or principal of their demands. Considering those things, and considering that the Court of Chancery was not a tribunal from which any very summary relief was to be looked for at that time, the Legislature thought it right to pass the Incumbered Estates Act; under which, I am happy to say, in the short space of seven years, incumbered property, amounting in value to I believe upwards of 19 millions, has been sold, and unfortunate

incumbrancers and creditors relieved in a way and to an extent that I am satisfied they could not have been, by any other means known to the law, in a much longer period, if at all.

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But I shall not waste time in considering further the policy that may have led to the passing of the Incumbered Estates Act, or to the conferring on the Judges appointed to carry out that admirably framed and most useful statute the very large powers which have been claimed for them. Suffice it to say, that Parliament considered that the well-being of this part of the British empire required that such an Act should be passed, and the Act was passed accordingly, the provisions of which it is now our duty to interpret, and to interpret merely. But, before attempting to do that, I would propose to take a short retrospective view of the state of the law, as bearing on this subject, at the time of the passing of the 12 & 13 Vic.; and that I propose to do, because a previous Act, which passed the Legislature about a year before, appears to me to throw considerable light upon the questions that we have now to consider. The Act to which I allude is the 11 & 12 Vic., passed in the month of August 1848, and was entitled "An Act to Facilitate the Sale of Incumbered Estates in Ireland." By that Act of Parliament, it was competent to the owners of incumbered estates, and to parties having incumbrances on estates in Ireland, by the means provided by that statute, to bring all such incumbered estates to sale by what, it was then hoped, would prove a short and summary process; and, as the most likely mode of attaining that end, the Legislature of that day in its wisdom thought it right to confer upon all parties desirous of availing themselves of that law the privilege of having their proceedings carried on in the High Court of Chancery, which, no doubt, it was then supposed (that being one of the old and long-established tribunals of the country, as well as the highest in rank, and having a staff of Masters and officers ready to set to work at any moment) would facilitate and accelerate all proceedings that might be taken under that statute. Now, that Act of Parliament was of a two-fold character; and without going through all its provisions in detail, I may state that it provided for sales of property which incumbered owners

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or their creditors might think fit to effect, *without* the order of the Court, as well as for sales to be effected through the medium of the Court itself. With respect to sales to be effected without the order of the Court, the 30th section confers that power on the owner, after the service of certain notices, and on complying with certain provisions specified in that Act; it authorises the owner to convey the property which he has so agreed to sell to a purchaser, the purchase-money, however, being previously lodged in Court; and by the 31st section a like power, after the service of certain notices, is given to an incumbrancer, and in that case the incumbrancer, and he alone, is to be the conveying party; but in that, as in the former case, the purchase-money must be lodged in bank before the conveyance; and by the 43rd section of that Act, the operation of a conveyance upon a sale, without the order of the Court, is defined; and it will be found that a conveyance by the person selling, whether the owner or an incumbrancer, "and without the execution of such conveyance by any other person," is made an effectual disposition of the land against all parties named in and bound by the notice required by the Act; and then, with reference to all other persons (I may say with reference to the world at large), we find, at the close of that section, the following provision:—"And from and after the expiration of five years from the time of the payment of such purchase-money into the Bank of Ireland as aforesaid, such conveyance shall have the same operation as if the sale and conveyance had been a sale and conveyance *under the order of the Court*, under the provisions hereinbefore contained." And then follows the 44th section, which is in these words:—"Provided always, and be it enacted, that a conveyance *without the order of the Court*, as aforesaid, shall not prejudice or affect any estate, right or interest, other than the estates, rights or interests against which such conveyance is made effectual upon the payment of the purchase-money into the Bank of Ireland as aforesaid, in case an entry, action, distress or suit shall be made or brought on or in respect of such other estate, right or interest, before the expiration of such *five years* as aforesaid; and it shall be lawful for any person claiming any such estate, right or interest

“in the land or lease comprised in such conveyance, to apply to the Court by petition in a summary way; and the Court may, upon such petition, order that a sum be set apart out of the purchase-money in respect of such estate, right or interest, or to answer any claim in respect of such estate, right or interest, or to answer any claim in respect thereof; or to be applied by way of payment in purchase of or *compensation* for the same, as the Court may think fit.”

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And now let us see what is to be the operation and effect of a conveyance where the sale is had by the order of the Court; for that is necessary, in order to understand the particular import of the provisions to which I have last called attention: and that brings me back to the 27th section of the Act, which is in these words:—

“And be it enacted, that the assurance of the land or lease sold *by order* of the Court under this Act shall be made in such form in all respects as the Master shall direct; and that the Master shall execute the same, and execution thereof by any other party shall not be necessary for the validity thereof: nevertheless, it shall be lawful for the Master to direct or authorise any other persons to execute the same, for the purpose of covenanting for title, or for the production of title-deeds and evidences, or otherwise; and the assurance shall be made to the purchaser, his heirs, executors, administrators and assigns, as the case may be, or as he shall direct; and in case the assurance so executed shall be a conveyance upon a sale of land under this Act, the same shall be effectual to pass the land thereby expressed to be conveyed, and the fee-simple and inheritance thereof, to the uses and in manner therein limited and expressed, discharged from all former and other estates, rights, titles, charges and incumbrances whatsoever of her Majesty, her heirs and successors, and of all other persons whomsoever, save and except such charges and incumbrances, if any, as shall be thereby excepted, or expressed to be or to remain charged upon such land, and except also as hereinafter provided.”

Having read those sections and the Act very carefully all through, I cannot say that I entertain a doubt as to the effect of

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a conveyance under that statute, the 11 & 12 *Vic.*, which was in full force at the time when the 12 & 13 *Vic.* was passed. I am very clearly of opinion that a conveyance under that Act, of land sold by order of the Court, would pass the fee-simple of the land so conveyed, discharged from any estate which her Majesty or any other person might have in the land; and a sale without the order of the Court would have the like effect at the expiration of a limited term, assuming the provisions of the Act to be complied with. If there could be a doubt as to the true meaning of the words used in the 27th section, the qualified character of the title given for a limited time to a conveyance where the sale took place without the order of the Court, and the time allowed for adverse claimants to come in and prefer their claims, as provided for by the 44th section, makes that matter, in my opinion, too plain for argument.

There is, however, in this Act (11 & 12 *Vic.*), an express saving for lessees. And inasmuch as there were no provisions introduced into that Act, authorising the Court of Chancery to go into an investigation of the rights or titles of the lessees or tenants of the lands sold, it was thought necessary, and rightly so, on account of the sweeping character of the 27th section, and the effect which the terms used therein must have in regard to the estate and interest of every tenant not specially saved by the conveyance, to qualify the 27th section by the following proviso, being section 28, and which is in these words:—"Provided always, and be it enacted, "that no such assurance as aforesaid shall prejudice or affect the "rights of any lessee, tenant or occupier in possession, nor the "rights of any lessee or under-lessee at a rent, subject to whose "lease or under-lease the petitioning owner or incumbrancer applying to the Court, under this Act, shall be an owner or incumbrancer, nor any right of common," &c.

Such are some of the important provisions of this first Incumbered Estates Act; and considering the powers which were thereby given to the Court of Chancery and to the Masters of that Court, it may appear strange that, during the year that elapsed prior to the 12 & 13 *Vic.*, no sale should ever have taken place under it.

How that happened I cannot undertake to say; but I know that one case was sought, but ineffectually, to be brought within its operation; that case, however, was subsequently transferred to the Incumbered Estates Court, and the property was there sold, and the purchase-money distributed.

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Having now briefly called attention to the state of the law at the time of the passing of the 12 & 13 *Vic.*, it occurs to me that no one can have any great difficulty in seeing that some very important provisions, and provisions touching the very subject we have now to consider, were introduced into the last Act, which were not in the former; and principally, a new tribunal altogether was established for the carrying out of its provisions.

But with reference to the effect of a conveyance as to barring all outstanding estates or titles generally, the same language, no doubt, is retained in the 27th section of the 12 & 13 *Vic.*, as we find in the 27th section of the 11 & 12 *Vic.*; and that because, as I presume, no words could be found in the English language more expressive for the purpose intended. I shall by-and-by have occasion to speak of the difference of the two sections as to leases and tenancies. But I am now dealing with outstanding estates and titles generally, whether in her Majesty or in a subject, for all are equally barred; and I wish to keep the subject of leases, and of all other general outstanding estates, distinct. With regard, however, to the provisions of the former Act, it might well be argued, as it has been in this case, that although the conveyance is no doubt to have the very large operation expressed by the 27th section, yet that there is nothing in the Act of Parliament which would, in terms at least, relieve the purchaser from the necessity of showing and proving that the property sold (and there might under that Act be a sale without the order of the Court, as I have already shown) was so circumstanced as to incumbrances or otherwise, as to come in strictness within the jurisdiction of the Court under that Act. I can well suppose a difficulty of that kind occurring to the mind of an astute and cautious, or possibly over-cautions, conveyancer.

But the Legislature, in framing a new law on the subject—a law which (regard being had to the state of the country at that time,  
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and to the state of the business of the Court of Chancery at that time, and to the proved ineffective character of the former Act)—it was of the utmost consequence should be made a practical measure. I say the Legislature, as it may well be supposed, under such circumstances, resolved to correct the imperfections in the former Act, and to put out of all doubt the title of a purchaser buying in the Incumbered Estates Court; and accordingly, not only is the conveyance by the Judges, or Commissioners, as they are called, of that Court, made “effectual” to pass the estate which they so convey, and that, as I have already said, against the Queen as well as all others, but by the 49th section—a new section not to be found in the former Act—the purchaser is relieved from all apprehension of being at any time thereafter obliged to go a particle behind his conveyance in order to assert or defend his title. Now see what the 49th section is; it is in these words:—“And be it enacted that every conveyance and assignment respectively executed as required by this Act, and every order for partition or for exchange, or for division and allotment, made by the Commissioners, under their seal, shall, for all purposes, be conclusive evidence that every application, proceeding, consent and act whatsoever which ought to have been made, given and done previously to the execution of such conveyance or assignment, or the making of such order respectively, has been made, given and done by the persons authorised to make, give and do the same; and no such conveyance, assignment or order shall be impeached by reason of any informality therein.”

It has been argued that the words used in the latter part of that section, viz., that no “informality” in the conveyance should render it liable to be impeached, ought to cut down the generality of the terms used in the previous part of the section, and to limit the operation of the whole section to “informalities” merely: with those who think there is anything in that argument, I scarcely know how to reason, because if the language of the statute be not of itself sufficient, I would have no hopes by any argument of mine to bring round others to think as I do on that subject; for I admit my inability, by any form of language, to add force or

clearness to the words which I have last read. But regard being had to the omission of this section from the previous Act, and to its introduction into the later Act, and to the comprehensive and "conclusive" character of the terms of the section itself, I would ask any candid reasoner what other meaning can fairly be given to those two sections, the 27th and 49th taken together, than that contended for on the part of the plaintiff in this case?

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I come now to another point in the argument, which, as I understand, is put thus:—It is said, admitting for argument that the conveyance should have the effect that I have been contending for, still the defendant in this case being a mere lessee, and not otherwise claiming any adverse estate in the lands, he is, in virtue of certain provisions in the statute, entitled to rely upon his lease, though not mentioned in the conveyance to the plaintiff; and accordingly, it is insisted that, in construing that conveyance, and in ascertaining the operation which it should have, the defendant's lease ought to be received in evidence, and should form an element in the consideration of the Court. Various arguments have been advanced in support of this proposition; I shall endeavour to deal with them separately.

It has been said that, under the 23rd section of the Act, it is the duty of the Commissioners to ascertain all outstanding leases and tenancies by which the estate is bound, and to sell subject to the leases so to be ascertained; and it is insisted that the defendant is, for that reason, entitled to go behind the conveyance, and to show that at one time—I think about two years before the conveyance—the Commissioners did consider that the defendant's lease was a good and valid instrument, and that the sale should be had subject to it; and that, therefore, if it was not saved by the conveyance, it ought to have been saved; and as it ought to have been saved by and excepted out of the conveyance, a Court of Law should construe the plaintiff's conveyance so as not to defeat the defendant's title under the lease, and should hold that under such circumstances an estate in fee-simple in possession in the *locus in quo* did not pass by virtue of the conveyance from the Commissioners, but only the reversion subject to this lease. Unquestionably, if this was



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a sale and conveyance under the Act of 11 & 12 *Vic.*, all that argument would be very good; and for this simple reason, that there is an express exception in that Act in favour of lessees, which exception is distinctly referred to in the very section that professes to state the effect and operation of a conveyance to a purchaser under that Act. Now mark the difference between the two Acts in this respect: the Legislature, knowing well that the effect to be given to the conveyance, by force of the terms used in the 27th section of the former Act, would defeat and destroy all outstanding leases if those provisions stood alone, expressly enacts, by way of proviso, by the 28th section of that same Act, that the conveyance (the operation of which was defined by the 27th section) shall not have that effect; it thus excepts all leases and tenancies as mentioned in that Act from the operation of the conveyance; and that was perhaps right in regard to that statute, inasmuch as no provision was made thereby for ascertaining and deciding upon the tenancies before the sale: but instead of there being any such saving in the 27th section of the later Act, which, be it remembered, is entitled "*An Act Further to Facilitate the Sale and Transfer of Incumbered Estates*," we find that by a previous section, viz., the 23rd, the Commissioners are to do what the Court of Chancery was not, at least by any express enactment, bound to do, and what, I apprehend, that Court could not have done by any summary process under the previous Act, namely, to adjudicate on all tenancies, leases, &c., subject to which it might be insisted the land should be sold: and then by the 27th section of the 12 & 13 *Vic.*, the conveyance by the Commissioners is to be effectual to pass the fee-simple and inheritance of the land thereby conveyed, "subject to such tenancies, leases and under-leases as shall be expressed or referred to *therein* as aforesaid; but, save as aforesaid, discharged from all former and other estates," &c., &c.

Is it not manifest from those two sections, the 23rd and 27th, that any lease not mentioned in the conveyance by the Commissioners cannot be set up to defeat their conveyance? But to those who still doubt as to the effect of those two sections, I say again, go back to the former Act, and mark the difference

of the provisions in the one and the provisions in the other, and in particular, the change of language of the 27th section of the later Act, manifestly to meet the amendments or alterations made by the 23rd section of that Act, in regard to the ascertainment of tenancies and leases.

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Then with respect to the argument founded on the supposition that the defendant's lease had been recognised and set up by the Commissioners, by reason of the preliminary notice of the 20th of May 1851, served on the defendant, thus seeking to make this an excepted case on that ground, I can only say that the persons who press that view of the case appear to me to be arguing in a circle: they say—"We claim a right to go behind the conveyance; because, if you let us go behind the conveyance, we will show it to be wrong:" thus they will either defeat the conveyance, by showing a prior and a better title in law than the title of the purchaser, or, if that will not do, they propose to call on a jury, by parol evidence, to construe the conveyance of the Commissioners; and I am sure I do not know which of the two courses would be the least objectionable.

Suppose the Commissioners did at one time—two years or so before their conveyance—admit and allow the defendant's lease, is it at all wonderful that they should afterwards have disaffirmed it, and resolved to sell and convey discharged of it? How many leases are there that may at one time be considered good, and yet that may afterwards, in the course of judicial proceedings, turn out to be otherwise; and a lease that might be good against one incumbrancer may not be good against another incumbrancer, or against a succeeding owner? And is a purchaser who gets his conveyance under the 27th section of the Act, and who rests on the provisions of the 49th section, to be called on to show at any distance of time—say nineteen years after his purchase—that a lease, subject to which he did *not* take his conveyance, was put out of the way by some of those means which I have suggested, or by some other means that may well be imagined?

The *locus in quo* seems to be a strip of the Bog of Allen, and it appears that a part of this bog was unsold, and, I presume,

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still remains unsold. I can well conceive it possible, and I only mean to speak of it as a possibility, that the Commissioner, in whose chamber this matter was attached, may have allotted, with the tacit, or possibly express, consent of the defendant, a portion of the unsold lot to him, as the twenty acres comprised in his lease, and I can understand an attempt being now made by the defendant to hold just twenty acres in addition to the twenty which he already has. But I protest against its being assumed that the Commissioner in this case has done anything unjust towards the defendant; for I am well satisfied he did not, and I would say the contrary ought to be the fair and legitimate assumption for this Court to make; but whether anything was done to affect the defendant's right to the *locus in quo*, through mistake or otherwise by the Incumbered Estates Court, that is no affair of the plaintiff's—he stands upon his deed, and insists that his deed is not to be defeated by any supposed pre-existing title, or not to be construed by parol evidence he knows nothing of, and should not be expected to be acquainted with; much less to be in a condition to prove by evidence the proceedings in the matter anterior to that document, or to show by what particular ruling of the Commissioners, or by what arrangement of theirs, he (the purchaser) got his conveyance in the form in which it now appears. It is quite impossible the purchaser could be in a condition to explain all that; and I will take leave to say that it would be no less against the plain policy, than the express terms, of the Act, to require him so to do.

But then again it has been argued (but also in a circle, in my opinion), that the estate or interest which the defendant had under his lease was, as it were, taken or carried out of the fee, and that the defendant's lease being in nowise incumbered, the Commissioners could not sell it; and that by selling discharged of it, the Commissioners in effect sold the interest in the lease itself, and that consequently the Commissioners manifestly had no jurisdiction in the matter, *quoad* the defendant's lease. As I said before, this is arguing in a circle. The Commissioners conveyed the fee, and that was within their jurisdiction; so upon that ground, the argu-

ment must fail, if the position with which I originally set out be well founded in law.

But, secondly, the Commissioners had a power to adjudicate upon the defendant's lease, and to annul it, and to convey discharged of it, if they thought it right so to do; and having conveyed discharged of the defendant's lease, it must be held that the Commissioners did not consider that lease to affect the particular lot conveyed to the plaintiff; or if it ever did affect that particular portion of the bog, it must be held that the Commissioners annulled it, or set it aside, *quoad* that lot, prior to their conveying the same to the plaintiff; and the act of the Commissioners in that respect, whether it was right or wrong, cannot be reviewed by this Court, or by any other Court, except by an appeal under the Act.—[See section 51 of Incumbered Estates Act.]

But thirdly, by the 36th section of the Act 12 & 13 Vic., the Commissioners had a jurisdiction to sell this lease, though it was never incumbered; and the practical and manifestly proper mode of doing that was, and always has been, to sell and convey discharged of the sub or minor interest, *i. e.*, without noticing it in any way in the conveyance, and afterwards, when the sale is had, to put a value on such sub-interest, regard being had to the amount of the purchase-money of the whole. I do not say that was done in this case, for I do not know; and I rather believe it was not, but I merely call attention to the 36th section of the Act, to show that it is not to be assumed as matter of law, as it seems most erroneously to have been, that the Commissioners have not a jurisdiction, when selling the fee, to include in such sale a minor interest not incumbered.

Much of the public time as I have occupied, I would feel bound to make some further observations on the Act, and to read some other of its sections, were it not that I find ready to my hand the judgment of the CHIEF JUSTICE of the COMMON PLEAS, in the case of *O'Donnell v. Ryan (a)*, and the judgment of CRAMPTON, J., in this case in the Queen's Bench, which is reported in the last number of the *Irish Common Law Reports*; and I think it would be unpardonable in me to repeat the observations so clearly expressed by

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(a) 4 Ir. Com. Law Rep. 44.

H. T. 1857. *Exch. Cham.* those two learned Judges. There is, however, one section in an Act (the 16 & 17 *Vic.*, c. 64), being one of the Acts for continuing the jurisdiction of the Incumbered Estates Court, which, I think, shows very clearly that the Legislature never did intend that a purchaser should be called on to go behind his conveyance for any purpose whatever, or that the validity of his conveyance should ever be questioned in any other Court; I allude to the 5th section of that Act—[Reads 5th section.]—Upon the whole, with all becoming deference to every one who thinks differently, I feel bound to say that I do not entertain any grave or serious doubt in this case, apart from the doubt which I must always feel when I find myself differing from others whose opinions I have so much reason to respect.

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With regard to the case of *Annesley v. Dixon*, in *Holt's Rep.* and 7 *Bro. Parl. Cases*, it may be sufficient to say that the Act of Parliament referred to in that case, viz., the 11 & 12 *W.* 3, only empowered the trustees to sell and convey estates that were vested in them by reason of the conviction or attainder of the owners; and with regard to the estate the subject of that case, there had been no conviction or attainder of the owner, and consequently no vesting of the estate in the trustees, and so no power in the trustees to convey; for they could only convey to another that which had been vested in themselves under the statute. That case does not, in my opinion, in any way touch the present; and with regard to the other authorities that have been cited, they have so little to do, in my opinion, with the question before us, that I would not think myself justified in taking up further time by referring to them.

I am, on the whole, of opinion that the several exceptions taken at the trial to the rulings and to the charge of the learned LORD CHIEF JUSTICE should be allowed, and that the judgment below should be reversed.

PERRIN, J., having stated the facts, proceeded to say:—

With regard to the question raised by the second exception, as to the admissibility of the rental in evidence, it strikes me that this rental was not in any manner connected with this case, or with the

conveyance in question, so as to be evidence in any manner admissible; it formed no part of the conveyance; it was not scheduled to it; it was prepared, before the sale of the lands, for other purposes, and the contents in no manner bear upon the question at issue. I therefore think that this second objection ought to be allowed.

With respect to the first, it appears to me there was evidence, and cogent evidence, to establish not a valid title to the land in question, in contradiction to the conveyance from the Incumbered Estates Court (such evidence would not be admissible), but on a part and parcel question, that is, whether these lands in question were part of the Bog of Muckland, or part of the Bog of Allen and Clunagh, and by that name conveyed to the plaintiff? It appears to me that on the pleadings such evidence was admissible, and that such evidence would not militate against the effect of the conveyance of the 29th of July 1853, but is perfectly consistent with it, namely, to show that the land, the subject of the ejectment, never was conveyed to the plaintiff. I concur in the opinion that, under the conveyance the purchaser was entitled to the absolute and entire possession of all that was conveyed, discharged of any lease not scheduled and made part of the instrument. But the exception is not pointed to that; there is a confusion in that part of the case. The learned Judge in his charge told the jury that the lands sought to be recovered, being within the ambit of the map traced upon the conveyance, although the lease was not referred to in the conveyance, yet if the plaintiff purchased subject to that lease, it would virtually be a purchase of the reversion in fee expectant on that lease. Counsel for the plaintiff called upon the Judge to direct the jury that, if they believed the premises sought to be recovered in the ejectment were within the ambit of the map depicted on the margin of the conveyance, and by said conveyance referred to, they should find for the plaintiff. The party excepting insisted not merely that the view taken by the learned Judge was not well founded, but he called on the Judge to say that the conveyance passed all the lands purporting to be conveyed discharged of the lease; he embarrassed himself by adding these terms, because if his case was, that Muckland was no part of the lands conveyed,

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it was no charge on the lands of Allen and Clunagh. The proper direction ought to have been this: that if the twenty acres were part of the lands of Allen and Clunagh, and were within the ambit of the map, they passed by the conveyance; but if they were not part of the lands of Allen and Clunagh, and if they were always known to be part of Muckland, although within the ambit of the map, yet, being no part of Allen and Clunagh, they did not pass by the conveyance of part of Allen and Clunagh, as they remained part of Muckland, no part of which was conveyed or affected by the conveyance of July 1853, which, in my judgment, only passed what was part of Allen and Clunagh.

The view I have taken does not in the slightest degree militate with the doctrine laid down by the Members of the Court who have preceded me, nor do I qualify the doctrine laid down by them. I conceive that, according to the words of the statute, and the authorities referred to, every *such* conveyance shall be effectual to pass the fee-simple and inheritance of the land thereby expressed to be conveyed. I am willing to give this conveyance the full force and effect of a fine levied at Common Law, and I cannot be called upon to go further; and taking this to be a fine of part of Allen and Clunagh, I think it would not pass the lands of Muckland.

A great many hard words have been used against this Act of Parliament; but if, instead of so doing, we were to look to its true meaning, and try to carry that out, and not endeavour to charge the Act with what does not belong to it, we would act more correctly and judicially, and we would be nearer doing what was right between the parties.

The short substance of my view is this:—This was an ejectment brought for a stripe or portion of land, part of the Bog of Allen and Clunagh, as described in the summons and plaint; and the defence says that the twenty acres, which it is alleged come within that description, are not part of the Bog of Allen and Clunagh, they are part of the Bog of Muckland; and although within the ambit of the map attached to the conveyance, the question remains, whether they are part of Muckland, and no part of Allen and

Clunagh? My view is that Muckland is not Allen and Clunagh, and therefore did not pass by this conveyance. E. T. 1857.  
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With respect to the third exception, I do not well know how to deal with it. I concur in thinking that the direction went too far, and it does appear to me that the direction required went too far also.

I think that the first exception ought to be overruled, and the exception as to the admissibility of the evidence allowed; and with respect to the third exception, I give no opinion.

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CRAMPTON, J.

I adhere to the opinion which I announced when this case was before the Queen's Bench. My reasons for that opinion are now before the public, and I shall not repeat them here; but I shall make a few observations upon the argument which has been addressed to us in support of the judgment of the Court below. That argument, so far as it rested on the statute, dwelt much upon verbal niceties in the reading of those clauses upon which chiefly the plaintiff's Counsel relied. Thus the stringency of section 27 was sought to be relaxed, by giving a force to the word "such," which appears to me to be inconsistent with the context—[Read section 27.]—The argument was, that "*such* conveyance," in that 27th section, is a word of reference, and must be read with reference to the preceding sections, in which a conveyance by the Commissioners is mentioned, and especially the 24th section; and that therefore the conveyance meant by the 27th section must be one in which, according to the 24th section, the tenancies, leases, &c., subject to which the sale is made, must be expressed or referred to. I admit the principle of reference, but I deny the conclusion made from it by the defendant's Counsel.

The 24th section enacts that "the conveyance shall be made by the Commissioners under their seal, and signed by two of them." This is peremptory, and this is the conveyance which by the subsequent sections is referred to by the word "such;" and the latter part of the 24th section, so far from qualifying, confirms the meaning necessarily deduced from the prior part of the clause;



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for, observe the words "*such* conveyance" are for the first time used in the latter part of this 24th section; and there, of necessity, "*such*" means the conveyance *under the seal of the Commissioners, and signed by two of them*. The words following in that section are directorial, only directing that in *such* conveyance the tenancies, &c., shall be inserted or referred to. The 25th section requires the Commissioners to indorse or write at the foot of "the conveyance" a certificate. Here it is "the conveyance," viz., such as that mentioned in the 24th section. But can any one contend that if the Commissioners neglected or omitted to indorse such a certificate, in a proper case for so doing, that thereby the conveyance would be nullified? In this instance, as in the case of a neglect by the Commissioners to insert in the conveyance the tenancies and leases subject to which the sale was had, the purchaser could not be affected by the default or omission of the Commissioners. The distinction between compulsory enactments and those which are merely directory is too well known to require many authorities to support it.

I will however refer to Lord Mansfield's opinion in the case of *Re Lordale* (a). "There is (says that great Judge) a known distinction between circumstances which are of the essence of the thing required to be done by an Act of Parliament, and clauses "merely directory:"—also *Re Justices of Leicester* (b). The case of the Dublin College of Physicians was decided on this principle. When the person claiming a benefit under a statute does all on his part which by the statute he is required to do in order to gain his title, that title cannot be nullified because a public officer has neglected to comply with a direction prescribed to him by the same statute, when the neglect is not of the essence of the thing to be done. The word "*such*," therefore, in the 27th section, upon legal principle as well as upon the plain meaning of the context, refers to a conveyance under the seal of the Commissioners, and signed by two of them. That is the essence of the thing to be done; the rest are matters not essential to the act to be done, but which, if the Commissioners neglect to do, they are guilty of default in

(a) 1 Burr. 447.

(b) 7 B. & C. 12.

their duty ; but the party who purchased is not to be prejudiced thereby. A similar straining of the words in the 49th section was resorted to in the argument ; the latter words were made to override the whole clause, and it was argued that *only* mistakes in the form of the conveyance were cured. But this argument is unfounded ; the early part of the clause (see section 49) refers clearly to substantial omissions previous to the execution of the conveyance, while the latter words are intended to cure all formal errors in the deed itself. Thus if we could suppose that the defendant Rorke had been indemnified, or had consented to the arrangement for the sale, as carried out by the conveyance, all objection would be removed, and under this 49th section are we not bound so to presume ? and perhaps in point of fact such was the case. Reverse the judgment, and *venire de novo*.

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PIGOT, C. B.

This case has been so fully discussed, I shall state my view very shortly.

In this case extreme positions have been taken on both sides. On one side it was asserted that, if the Commissioners sold land, over which they assume a jurisdiction, but which land did not belong to the party named in the petition and order as the owner thereof, their conveyance conferred no title as against the true owner of the land. On the other hand, it was asserted that the power of the Commissioners was so large that, without a petition or incumbrance, or anything which the Act declares necessary to confer jurisdiction, the lands comprised in their conveyance would pass to a purchaser ; the necessary result of that would be that, if so disposed, they might convey to one man the estate of another. In my opinion, both these views are untenable. If the first proposition were well founded, it would defeat the purposes of the statute, the object of which was to give to the purchaser what has been popularly called a parliamentary title. If the second proposition were tenable, it would confer on the Commissioners a power so enormous, that such a meaning ought not, if possible, be attached to it.

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As I read the Act, the legislation is plain. The Commissioners acquire their jurisdiction under the 16th and 17th sections of 12 & 13 *Vic.*, c. 77. The fifth General Order made by them directs that every proceeding under the Act must be in form a petition, showing the lands are incumbered in the manner described. When a petition has been filed, then, under the 21st and 22nd sections, in every case there must be an order for sale. The petition is the form of bringing the matter before the Commissioners; and the order for sale is the adjudication under that petition. The statute confers on the Commissioners most ample powers, for the purpose of obtaining information; it is obligatory on them to give notice to the parties interested; and a large discretion is given to them in the matter. When the jurisdiction has attached, they have power to convey, and the statute gives the purchaser under that conveyance a sufficient title. Without attributing to the Commissioners any despotic power, they fill a two-fold capacity; they are the donees of a parliamentary power, and also a Court of summary jurisdiction in all matters preliminary to the conveyance. As donees of the power, they must pursue the authority given to them by the statute, and comply with those requisites; and if they do not comply with them, they cannot confer title. These requisites consist in nothing more than receiving the petition, and making thereon an order for sale. The adjudication under the 16th and 17th sections is final, unless there be an appeal to the Privy Council; and the further proceedings under the 21st and 22nd sections are perfectly conclusive; an order made under them, irrespective of fraud, cannot be inquired into by any Court. The result is, that the conveyance of the Commissioners of lands specified in the order for sale confers a complete title; but it confers no title unless the lands are brought under their jurisdiction by petition.

The 24th, 27th and 49th sections establish both these propositions. The 24th section directs the manner of execution of the conveyance; and the 27th section declares this conveyance shall be effectual to pass the fee-simple and inheritance of the land thereby expressed to be conveyed, subject to such tenancies, leases and

under-leases as shall be expressed or referred to therein, discharged from all former and other estates, &c. ; and the 49th section provides that every conveyance and assignment respectively executed, as required by this Act, shall, for all purposes, be conclusive evidence that every application, proceeding, consent and act whatsoever, which ought to have been made, given and done, previous to the execution of such conveyance or assignment, or the making of such order, has been made, given and done by the persons authorised to make, give and do the same.

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It appears to me clear that the Commissioners had no power to convey, unless the matter is brought before them by petition ; and when once an order is made, they have power to convey. It is said that a purchaser cannot look behind his deed. I see no difficulty in requiring a purchaser to see that there is an order for sale, and a petition on which it is founded ; it would be a short and easy inquiry : but I retain the opinion I formed in the case of *Rutledge v. Hood*, namely, that when once the jurisdiction attaches, and the conveyance has been made in pursuance of it, the title is not examinable by any tribunal ; no error, no misprision, can affect that conveyance. But if the conveyance is not made under the Act, the Commissioners are strangers to the Act, and they cannot confer title, because they do not exercise jurisdiction, which is only acquired by the petition. It is plain, upon the language of the 21st section of the first Incumbered Estates Act, and the 22nd section of the late Act, when once the Commissioners determine the lands are incumbered, their jurisdiction attaches, and the order for sale made thereon is final ; and whether there be a mistake or not, the conveyance confers title, which is conclusive under the 49th section. As I read that section, the conveyance shall be conclusive evidence that an application was made by the person authorised to make it ; all that is necessary is, that the conveyance shall be conformable to the order : but to say that the Commissioners shall convey lands which they never sold does appear a proposition so absurd and useless, I am only surprised it ever has been advanced. The conveyance must, irrespective of the words of the Act, have the effect it would at Common Law, under the ordinary

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presumption *omnia presumuntur rite esse acta*. That presumption will not be repudiated, unless it be shown that the Commissioners had no jurisdiction, or that they had exceeded their jurisdiction. No purchaser ever will be deterred from purchasing, upon a statement that the Commissioners will convey lands they never made an order to sell, and which were never referred to in the petition. I hold the conveyance confers most ample title, that it protects the purchaser against all difficulties, and gives title against the whole world, if the lands be only named in the order and petition.

But that question does not arise here; for assuming that the lands are comprised in the conveyance, assuming that Muckland is a portion of those lands, it appears to me that this conveyance confers a conclusive title discharged of the lease. There is evidence that the jurisdiction of the Commissioners attached. The rental shows that these premises were comprised in the order for sale; and it may be that there never was a public sale, except by the conveyance which is in controversy. It appears that the plaintiff purchased the lot named in the rental as No. 4, another purchaser bought No. 5, and took part of No. 4, and the plaintiff got included in his conveyance, as his indemnity, part of No. 3, which had never been sold. Nothing can be plainer than that there was here a very great misprision, and that a proceeding of this nature ought not to have taken place without notice to the tenants; it was however an error which, the jurisdiction having once attached, was not examinable, and was cured by the 49th section, for we have in this case all the elements necessary to secure the title of the purchaser—there is a petition, an order on that petition, and a conveyance. So far, therefore, the jurisdiction has been plainly exercised, and the conveyance is in conformity with the Act of Parliament.

Then the question arises, whether there is in the position of the lessee a protection under the 23rd, coupled with the 27th section? Undoubtedly in the 23rd section there is a direction that the Commissioners shall sell subject to the rights of those tenants whose rights they shall ascertain; it gives a power to inquire into the existence of leases; and the Commissioners are to make such inquiries as they shall think necessary.

Without more, that section imports a complete and conclusive authority to the Commissioners to determine what leases shall, and what leases shall not, have protection. Then comes the 27th section ; and the plain meaning of that section is, that whenever a conveyance is made, upon a sale of lands, such conveyance shall be conclusive, except as to such tenancies as are expressed therein. Words could not be more comprehensive, that the lands *expressed* to be conveyed shall pass the fee, save as aforesaid, that is, the tenancies so expressed. The effect of it is to make the conveyance a complete adjudication that no lease subsists except the leases specified in the conveyance. The conveyance imports that the Commissioners had jurisdiction, until the contrary be shown, and that conveyance makes no reference to the lease.

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If the view I take be correct, the question suggested by my Brother PERRIN cannot arise. If Muckland be no part of Allen and Clunagh, the question will arise, whether Muckland passed by this conveyance? But the question would be different if neither of those denominations appeared in the order for sale.

Upon the whole, I consider there is sufficient to give a good title ; that we are bound to presume everything in favour of this conveyance ; that the judgment of the Queen's Bench ought therefore to be reversed.

With regard to the case of *Annesley v. Dixon*, I think, for the reasons stated by my Brother GREENE, that it has no bearing on the present case.

MONAHAN, C. J.

In this case a purchaser under the Incumbered Estates Court seeks to recover in an ejectment what he describes as a stripe or belt, being portion of the Bog of Allen and Clunagh, adjoining the lands of Muckland, conveyed to him by the Commissioners for the Sale of Incumbered Estates in Ireland, by deed of the 29th of July 1853. To this ejectment the defendant took defence, for what he describes as that part of the Bog of Muckland, in his possession, containing twenty acres.

I do not however think that anything turns on the form of the

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defence. No doubt exists as to the identity of the premises sought to be recovered, although the plaintiff seeks to recover them by one name and the defendant seeks to justify his possession by another name.

The plaintiff relies on the conveyance by the Commissioners of the Incumbered Estates Court. There is no formal defect suggested to exist in this conveyance, and by it the Commissioners granted to the plaintiff that part of the Bog of Allen and Clunagh, containing 777 acres, and which said lands were in said conveyance mentioned to be described in the map annexed thereto. The map is not on a separate sheet or piece of parchment, but is on the same sheet as the conveyance, and forms part of it. It is not alleged that the map does not contain what it purports to contain, namely 777 acres, and there is no allegation that the portion of the land now in dispute is not part of the 777 acres. This is substantially the case of the plaintiff: he says, I purchased the lands delineated by the map as part of the Bog of Allen and Clunagh. Whether that be the true and proper name of the lands cannot on this record be questioned, as it appears to have been admitted, or at least not denied at the trial, that the part in dispute is part of what the Commissioners professed to convey. The defendant produced a lease, which is still subsisting, of the twenty acres in dispute, in which they are described as part of Muckland. The question at the trial was, what was the law applicable to that state of facts?

It does not appear to have been contended at the trial, nor as far as I see could it, that some interest in the lands in question did not pass to the plaintiff. It appears to have been assumed that something passed, in the twenty acres in question, to the purchaser; and the only question was whether that something was an estate in possession, or an estate in reversion, subject to defendant's lease?

The defendant, at the trial, tendered in evidence this lease, and the rental under which the premises were sold; and the first question that arises is, are these documents properly admissible in evidence? For what purpose can they be used? The rental was tendered in evidence to show that the purchaser, previous to the conveyance to him, bought under this rental, and therefore subject

to the lease stated therein, and defendant endeavoured thereby to alter the effect of the conveyance to the purchaser. I am of opinion they were not properly receivable for any such purpose, and that this exception should have been allowed.

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What next appears on the record? The CHIEF JUSTICE read the issue to the jury, and explained to them the nature of the case, and told them that although the premises sought to be recovered in the ejectment were within the ambit of the map traced upon the conveyance, and although the lease of the 9th of March 1822 was not referred to in the conveyance, yet if the premises sought to be recovered were demised by that lease, and that the plaintiff in fact purchased subject to that lease, the purchase would be only a purchase of the reversion expectant on that lease, and that in such case the plaintiff's conveyance would pass only such reversion, and that in such case the plaintiff was not entitled to recover. It seems to have been assumed by the CHIEF JUSTICE in his charge, that the conveyance passed something, and that whether that something was an estate in possession or reversion was to depend not merely on the fact of the existence of the defendant's lease, but on the fact whether the purchaser had notice of the existence of such lease, and *purchased*, that is, agreed prior to the conveyance, to him to purchase, subject to such lease, that is, in other words, making the effect of the conveyance depend on the previous contract.

The plaintiff excepted to this charge, and required the CHIEF JUSTICE to inform the jury that by the conveyance the lands passed to him discharged of defendant's lease; and the question we have to consider is, whether or not this exception is well founded? It has scarcely been argued that the effect of the conveyance is to depend on the previous contract, but the principal question argued is, had the Commissioners any power to sell discharged of defendant's lease, so as to entitle the purchaser to hold discharged therefrom?

In order to come to a satisfactory conclusion as to their power to sell discharged of this lease, it will be necessary to consider their powers in reference to other matters. I do not entertain any doubt but that it was the intention of the Legislature that the Com-



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missioners should sell only estates that were in fact incumbered, and that previous to making any such sale there should have been an order for sale made by them; that they should make such order only on the application, either of the owner of such incumbered estate, or of a person entitled to an incumbrance affecting same. But though such, I have no doubt, was the intention of the Legislature, I am equally clear in the opinion that it was also the intention of the Legislature that the Commissioners should themselves inquire and determine, whether in fact the estate sought to be sold was one which should be sold under the Act, and that it also was the intention of the Legislature that the decision of the Commissioners on the subject should be final and conclusive.

I stated at some length, in delivering my judgment in the case of *O'Donnell v. Ryan* (a), the reasons which induced me to form that opinion. I have since very frequently re-considered the subject, and I have attended with all the attention in my power to the arguments which have been addressed to us in this case; and I have not been able to see any ground for altering the opinion I then formed. The Court of Queen's Bench, in the present case, seem to have thought that the case of *Annesley v. Dixon* (b) was an authority against the view taken by me as to the construction of the Incumbered Estates Act; but, with great deference to their opinion, it occurs to me that that case, carefully considered, is a very strong authority the other way. In that case it was conceded by the Bar and the Bench, that if the Commissioners had, under the Act then under consideration, authority to inquire and determine whether the estates were in fact forfeited, or had belonged to King James, that their determination on that point, however erroneous, would have been conclusive; and the argument altogether turned on the question, whether there was any provision in the Act authorising the Commissioners to make such an inquiry or determination? The judgment of Powell, J., states the question very clearly. He says:—"I take it there is but one single question in this case, "and that is, whether the trustees had a power to determine what "was vested in them; and for that, I take it that no land was "vested in the trustees, but what belonged to King James or

(a) 4 Ir. Com. Law Rep. 66.

(b) Holt's Rep. 372.

“forfeiting persons:” and the result of that case is simply this, that the Judges who had to determine it came to the conclusion that the Commissioners, under the Act, had no power or authority to determine whether in fact an estate had belonged to King James on the day stated in the Act, or had been forfeited, and therefore that the sale or conveyance was not conclusive of such fact. Can this reasoning apply to the present case? Can it be said that when a petition is presented to the Commissioners for the sale of an alleged incumbered estate, that it is not the duty of the Commissioners to inquire and determine whether in fact the alleged incumbrances affect the estate in question?

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The 9th section directs the Commissioners to frame and promulgate forms of application indicating the information to be furnished with reference to title, incumbrances and such other information as in their judgment may assist them in forming an opinion on such application: for what purpose, but that of enabling them to determine whether the estate is one which ought to be sold under the Act? By the 15th section, the Commissioners are a Court of Record for the investigation of title, for ascertaining and allowing incumbrances and charges, and the amounts due thereon, and settling the priority of such charges and incumbrances respectively, and the rights of owners and others, and generally for ascertaining, declaring and allowing the rights of all persons in any lands or lease in respect of which application may have been made under this Act; and they may send cases for the opinion of a Court of Law, or to be tried by a jury on an issue of fact.

Now, as I understand the argument on this part of the case, against the jurisdiction of the Commissioners, it amounts to this, that unless there is in fact brought into this Court an estate incumbered, within the meaning of the Act, they have no jurisdiction, and all their proceedings are void, as *coram non Judice*. Now, let me suppose a case of not impossible occurrence, and which has in fact occurred in the Court. A party incumbers an estate, claiming to be tenant in tail, under a will of doubtful construction. The Commissioners, having considered the case, are of opinion it is one of doubt and difficulty, and think it right to take the

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opinion of a Court of Law, as to what estate the alleged owner takes under the will in question. That Court, after consideration, are of opinion, and certify that, under the will in question, the party took an estate tail; and therefore, that the judgments or other incumbrances created by him affect the fee of the lands. The Commissioners, acting on this opinion, sell a portion of the lands, and the purchaser enters into possession. Let me suppose that, in some years after, litigation arises in relation to the title to the unsold lands, and the same, or another Court of Law, overrule the decision previously made on the same will, and determine that the devisee, instead of being tenant in tail, was only tenant for life, or tenant in fee, with an executory limitation over. Now, can it be contended in a case like this which I have supposed, that it would be competent for the claimant to the estate to support an ejectment against the purchaser, on the grounds that in fact the estate was not at all incumbered, and that the alleged owner was merely tenant for life? How, consistent with the 51st section, which renders every order of the Commissioners, unless appealed from, final,—could it be held, in the ejectment against the purchaser, that the propriety of the decision I have supposed could be questioned? And if it could not, what becomes of the argument that they cannot confer jurisdiction on themselves? In the case I have supposed, the later decisions determined that in fact the estate sold was not incumbered, and that there was no owner before the Court. Still does it not clearly follow, from the reasoning in the case before Lord Holt, that if the matter rested merely on the 15th section, that the Commissioners having authority to determine the fact of the ownership and of the estate being incumbered, that their determination, however erroneous, must be final and conclusive?

But if it were possible to raise or suggest doubts—if the matter depended on the 15th section alone—I confess I never could see how such doubts could exist, having regard to the 24th, 27th and 49th sections, which regulate the form and effect of conveyances executed by the Commissioners. The 24th section directs that when the Commissioners sell any lands, the conveyance shall be

under their seal, and signed by two of them, and the execution by any other party shall be unnecessary; and it then provides that such conveyance shall express and refer to the tenancies, leases, &c., subject to which the sale is made. The 27th section enacts that every *such* conveyance, executed as aforesaid, by the Commissioners, on the sale of land, shall be effectual to pass the fee-simple, subject to the leases expressed therein, and discharged from all estates, &c. Is it not clear that the words "such conveyance," in the section, refer to the same words "such conveyance" in the 24th section; that is, a conveyance under the seal of the Commissioners, and under the hands of any two of them, executed on the sale of any lands? I cannot, in this 27th section, find anything confining its operation to the sale of lands which the Commissioners ought to have sold. The words are as general as words can be, and expressly discharge the lands so conveyed from all former and other estates, rights, titles, charges and incumbrances whatsoever. But in order to prevent any question being raised as to the obligation of the purchaser to show that the necessary proceedings were had in the Incumbered Estates Court prior to the conveyance, the 49th section provides that "every conveyance, executed as required by the Act (*i. e.*, under "the seal of the Commissioners, and signed by two of them, and "in the form prescribed), shall, for all purposes, be conclusive "evidence that every application, proceeding, consent and act "whatsoever, which ought to have been made, given and done "previously to the execution of such conveyance, has been made, "given and done by the persons authorised to make, do and give "the same; and no such conveyance shall be impeached by reason "of any informality therein."

Now what is the meaning of the word "application" in this section? The word "apply" or "application" is used in the previous sections of the Act only as describing the primary proceeding taken by the owner or incumbrancer requiring a sale, as in the 16th and 17th sections. Now, let me ask what application ought to have been made before the Commissioners sold or conveyed any land? Ought it not to be an application by the owner of the land so sold, or by a person having

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an incumbrance affecting it? Is not, therefore, the conveyance conclusive evidence that a petition for a sale had been presented by the proper party? and is any Court to allow this conclusive evidence to be contradicted by showing that either through error of judgment or mistake the Commissioners have sold an estate not at all incumbered? The conveyance being conclusive evidence of the proper application having been made, I cannot agree in the view suggested by my LORD CHIEF BARON, that, to render valid a conveyance by the Commissioners, it is necessary that a petition should be presented, praying a sale of the lands conveyed. The purchaser, in my opinion, is not to be entangled in such inquiries; it is sufficient for him that the Commissioners have sold and conveyed the lands to him. In the same way, the word "proceeding" in the 49th section must mean, among others, an order for sale, and if to render proper any particular conveyance the consent of any party should have been previously given, the conveyance is also conclusive evidence that such consent had been given. The result of all this is, the Commissioners ought not to convey unless they have previously sold; they ought not to sell unless they had previously made an order for sale; they ought not to make such order of sale except on notice to the proper parties and on the application of the real owner or an incumbrancer of the lands so sold. But by the 49th section of the Act, the conveyance is itself conclusive evidence of the execution of each and every of the requisites I have mentioned; and such is the construction put upon the Act by the Commissioners and the public who purchase in their Court. The purchasers have not access to, nor are they incumbered with, the title-deeds; the purchaser's only title is his purchase deed and the counterparts of the leases, subject to which he purchases.

I have considered it advisable to go more at length into this part of the case than is absolutely necessary for the decision of the case before the Court, because I think it is the duty of this Court, as far as can be done by a distinct and clear expression of their opinion, to set at rest all doubts which have been recently suggested, as to the possibility of the purchaser's title being affected by showing that by mistake or otherwise lands have been sold which ought not to

have been sold, or that there has been any defect or irregularity in the proceedings of the Court. In the present case none of these difficulties in fact exist. It is admitted that the estate conveyed to the purchaser was sold to him, that it was an incumbered estate, and that the proper petition for sale had been presented. But it is said the Commissioners had no power to sell it except subject to Rorke's lease; may I ask, if we are to inquire into merits, where is the foundation for that allegation? If there were incumbrances affecting the property, prior in date to Rorke's lease, and that a sale discharged of such lease was necessary for the payment of such incumbrances, would not the Commissioners have had the power to sell discharged of the lease, and that, even though originally they had intended to sell subject to the lease? Could not they have sold discharged of the lease, with the assent of Rorke? Does not the 27th section in express terms say that the conveyance shall be effectual to pass the lands expressed to be conveyed, subject to such tenancies and leases as are expressed or referred to therein, and discharged from all other? What right have we or any other Court to change the words "as are expressed or referred to therein" into the words "as ought to be expressed or referred to therein," or into any words of similar import? And if, to justify the sale or conveyance discharged of the lease in question, any order, proceeding or consent was necessary, what right have I or any one else to say that under the 49th section the conveyance itself is not conclusive evidence of the execution of such order and consent?

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On the whole, therefore, I entertain no doubt but that, according to the true construction of the Act in question, the purchaser is entitled to hold the lands discharged of Rorke's lease; and, therefore, that the exception to my LORD CHIEF JUSTICE's charge should have been allowed, and therefore that the judgment of the Queen's Bench should be reversed and a *venire de novo* awarded.

LEFROY, C. J.

This case comes before the Court on three exceptions. The first and second relate to the admission of evidence; they depend upon the third, and must be decided by it; for if it be open to the

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The material facts to be collected from the evidence on the record are these:—A petition was presented, in 1851, to the Incumbered Estates Court, for the sale of the fee-simple estate of a Mr. Hamilton, for the payment of incumbrances. It consisted of several denominations of land. By an order of the Court, the estate was divided into several lots for sale; of these it is only necessary to notice three, namely, lots 3, 4 and 5. Lot 3 is described as consisting of about 800 acres of the lands of Clunagh, and part of Muckland. Lot 4 is described as consisting of a part of the Bog of Allen, containing 777a. 3r. 4p., or thereabouts. An absolute order for a sale was made, and notices pursuant to the 23rd section of the Act were served on the tenants to bring in their leases. Mr. Rorke (the defendant in this cause) accordingly brought in his. It was a lease of part of the lands of Muckland (in lot 3), executed in the year 1822, for three lives, one of which is still in being, to a person of the name of Wilton, and since assigned to the defendant. Printed rentals, with maps annexed, of these several lots, were then prepared by the Commissioners, and published under their seal, with a view to the sale which had been ordered. These are the maps and rentals referred to in the bill of exceptions. The defendant's lease, with its date and all particulars, was set out in the rental of lot 3, with a reference to the map annexed, and the lease was thereby declared to be binding on the estate of Mr. Hamilton, and the sale that was to be made was thereby declared to be subject to that lease. This lot 3 ultimately remained unsold, but lot 4, as described in the rental and map of that lot, containing 777a. 3r. 4p. of the Bog of Allen, was sold to Mr. Errington, the plaintiff in this cause; and lot 5 was sold to a Mr. Bolton. Six months after this sale, which took place on the 16th of November 1852, a transaction took place between the plaintiff and Mr. Bolton, which in fact has been the occasion of this suit. Mr. Bolton, being desirous to obtain a part of the bog purchased by the plaintiff in lot 4, applied to the Commissioners by motion for that purpose, with

the consent of the plaintiff; and it was accordingly, by order of the Commissioners, bearing date the 6th of May 1853, transferred to Mr. Bolton for a sum of £10, paid in to the credit of the matter, and in lieu thereof the part of Muckland in lot No. 3, contained in defendant's lease, was transferred to the plaintiff by the same order of the Commissioners. The deed from the Commissioners to the plaintiff makes no mention of the lands of Muckland, and conveys the premises exactly in the terms used in the map and rental of lot 4, under which the plaintiff purchased (viz., 777a. 3r. 4p. of the Bog of Allen), but the map annexed to the deed was altered from that under which the plaintiff purchased; and it is now insisted that, by words of reference to the map so annexed, the defendant's premises are conveyed to the plaintiff, although not mentioned by name either in the conveyance or the map. All this took place without any communication with the defendant, or any concurrence on his part, or any consideration provided for him for the loss of his interest, which it is now insisted was defeated by this proceeding.

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It cannot be denied that the case thus presents such irregularities and inconsistencies as show a total departure from the course of proceeding prescribed by the Act. The premises sold, according to the rental, are different from the premises conveyed, and the premises now sought to be recovered differ from both. The map annexed to the conveyance differs from the map under which the lands were sold; and finally, the lands were conveyed discharged of the defendant's lease, though by the final notice of sale, served on the tenants under the 23rd section of the Act, and by an order under seal of the Commissioners, the lands of Muckland were ordered to be sold subject to his lease; and to the reception of this document in evidence, the plaintiff took no objection.

These circumstances might well have warranted a direction to the jury that the plaintiff had failed to show such a conveyance under the Act as could establish any title, but I did not wish so to direct the jury; nor will I now stop to observe further on the inconsistencies between the course pursued in this case and the provisions of this Act of Parliament, or on the hardship or injustice



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of the proceedings towards the defendant ; because, as the argument for the plaintiff boldly rests upon the assertion that the Commissioners have a jurisdiction to convey *any* land of *any* person, and that their conveyance shuts out any inquiry or investigation beyond the four corners of the deed, I shall at once proceed to examine the grounds on which the argument rests, and the nature and extent of the jurisdiction given by this Act.

It is said, firstly, that under the Incumbered Estates Act the effect of the deed of conveyance from the Commissioners was to pass a fee-simple estate in the lands thereby conveyed, discharged of every prior title and of every lease except those mentioned in the schedule to the deed, and that no evidence can be received even to show that the Commissioners have conveyed land not belonging to the petitioning owner, or not liable to the petitioning incumbrancer, although the evidence forms part of the proceedings. And, as a corollary to this proposition, it is argued, secondly, that notwithstanding the order of the Commissioners, declaring that the lands were to be sold subject to the defendant's lease (which order was given in evidence without any objection on the behalf of the plaintiff), still the subsequent omission to insert the lease in the schedule to the deed of conveyance had the effect of defeating and destroying that lease.

Now it appears to me that the only jurisdiction given or intended to be given by this Act is a jurisdiction to sell and convey, at the instance of an owner or incumbrancer, such lands as are *subject to incumbrances*, for the purpose of discharging the same. I admit it thereby enables the Commissioners to bind and bar the right, title and interest of all persons whatsoever or wheresoever, who may be subject to or affected by such incumbrances. Thus far I go with the advocates of what is called a parliamentary title. I admit that the Commissioners' conveyance is *primâ facie* effectual to pass the fee-simple and inheritance of the land thereby expressed to be conveyed ; and in that sense I understand and adopt the language of the 27th section, and that the purchaser is entitled to rest upon that conveyance as full and complete *primâ facie* evidence of title. That it carries with it the presumption belonging to every Act of a Court

of Record, of being done within and according to the limits of its jurisdiction, and that it rests upon those who would question the efficacy of the conveyance, or the jurisdiction of the Court, to do so by a case made out on their part. This appears to me to meet every avowed object of "the Act for Facilitating the Sale and Transfer of *Incumbered* Estates," without straining it so as to prejudice or bar the rights and interests of those not subject to be affected by any act of the party entitled to petition for the sale. It has been argued that it would totally defeat the value of this Act, unless it be held to give the power of rendering the conveyance once executed by the Commissioners conclusive against all the world, and to enable the holder of it to throw it down not as a *primâ facie* title, but as precluding the possibility of showing that it comprised lands of which neither the owner nor incumbrancer were before the Court, or, in other words, of showing that the lands of one man had been sold to pay the debts of another. It appears to me that any such argument altogether overlooks the great benefits which the Act confers upon the three classes of persons interested in a sale, viz., owners, incumbrancers and purchasers.

Let us consider the condition of these parties as they stood under any former tribunal by which a sale for the payment of incumbrances could be effected, the difficulties and delays which stood in the way of obtaining an effectual decree, arising from defect of parties, abatement by death or otherwise, and the consequent necessity of supplemental proceedings, the expense and delay of investigating title, even after a decree for sale was obtained, and the further difficulty in which purchasers were involved, from the conveyance of the Court not being even *primâ facie* evidence of title, the purchaser being therefore obliged to trace back and establish every link of the chain which constituted the title which he purchased.

These and various other difficulties are obviated effectually by this Act; but I confess I cannot go the length of giving the Act a construction which is only calculated to render it unjust and injurious; neither can I see anything in the language of the Act to

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I think I may therefore say with confidence that, up to the 27th section at all events, the subject of the jurisdiction given by this Act is not an estate or land generally, but an estate or land *subject to an incumbrance*; and that unless there be something in the sequel very plainly to do away with this qualification or restriction, the jurisdiction must be taken to be so limited. It is, however, contended that, by the 27th section of the Act, the conveyance of the Commissioners is made effectual to pass an estate in fee-simple in possession of the lands conveyed, even in a case where the land was not subject to any incumbrance, or in a case where neither owner or incumbrancer were before the Court. I admit the words of that section are exceedingly strong, and sufficient for the purpose, if there could not be a sound and satisfactory construction given to those words, which will oust altogether any such interpretation as is now contended for; but I apprehend it is a settled rule of construction that however large and extensive the words may be which are used in an Act conversant about a particular matter, and giving a particular jurisdiction, such words are to be confined and interpreted so as to be referred to the

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at, and the subject-matter of the jurisdiction, and you take this whole Act together, it appears that the Legislature neither gave, or intended to give, a title to *incumbered land*. Is it to be understood that the title mentioned in the 27th section, although they be out of the realm, idiots or lunatics, infants or persons of unsound mind, or *whomsoever* to be held to be the estates of all persons of that description; and without giving them one hour's notice, their title is *ipso facto* extinguished by the operation of this conveyance? Is that the policy or principle of British legislation? What did the Legislature do when they gave a parliamentary title?—for we are not at a loss for an example of one—we have it under the Statute of Fines, 4 Hen. 7, where there was a parliamentary title given, but given with a wholesome qualification for the protection of strangers. Look at the caution with which the Legislature dealt with that subject; first they directed proclamations to be made to give notice to all persons interested in making claims; then they gave five years to come in and claim; and further, the stranger had preserved to him by that Act the Common Law protection of the plea "*quod partes finis nil habuerunt*;" and in addition to all those precautions against any injustice being worked by the provision that fines should be final and conclusive as well against strangers as parties, we see that the Legislature expressly saved the rights of all persons within the age of twenty-one years, and persons in prison or beyond the seas: and yet it is insisted that in the present Act, without notice, without time allowed for claim, and without any analogous plea to that which was open under the Statute of Fines, the Legislature intended to bar the rights of strangers, whether they be persons out of the realm, idiots, lunatics or infants; for of necessity all are barred, if the words in this 27th section are not to be limited to the subject-matter of the Act. I may further observe that, if the construction sought to be put on this 27th section is to prevail, it will virtually repeal the Registry Act; for, suppose a man

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inheriting an unincumbered estate to make a settlement which is registered, limiting a life estate to himself; he subsequently executes a mortgage which, before the passing of this Act, would admittedly have been invalid to affect the interests of those in remainder; but according to the present argument, if the Commissioners sell this estate, and their conveyance be registered, those deriving under the previously registered settlement will be for ever barred, and cannot even offer the settlement in evidence to protect their rights. It seems to me, upon all these grounds, plain that the 27th section is only designed to apply to such estates as the rest of the Act is conversant about, and that the true meaning of the words "such conveyance" is such conveyance as was spoken of throughout the preceding 26 sections, a conveyance of an *incumbered* estate.

But it has been said that, even taking the jurisdiction given by this Act to be limited to the sale of *incumbered* estates, still the present case was clearly within the jurisdiction; for that here was an incumbered estate, that the reversion in fee was admittedly subject to an incumbrance; and it is insisted that this confers an authority to sell the land in fee-simple in possession. This argument seems to me to presume that the Legislature intended, whenever there was an incumbrance affecting any particular estate or interest in the land, that every prior estate or interest might be sold, so as to transfer an immediate title to the actual possession; for example, in the present case, the reversion in fee being subject to an incumbrance, it is insisted, that the Commissioners were thereby authorised to sell and convey a fee-simple *in possession* in the land. If, indeed, the incumbrance affects the fee-simple *in possession*, I admit a good title may be made to it, for the land and the estate in the land are in such a case both equally subject to the incumbrance, and consequently may both be sold together for an incumbrance which affects both. But does that apply where the incumbrance only affects the reversion? The argument must come to this, that whenever the owner has made a lease, and afterwards created an incumbrance (which is subject to the lease), the owner or incumbrancer may get rid of the lease by going into the Incumbered Estates Court, if by accident, oversight or contrivance they can obtain a sale and

a conveyance to a purchaser, omitting to notice the lease, although prior to this Act there was no proceeding whatever, at Law or in Equity, whereby the lease could be affected. Now, is it conceivable that the Legislature could have intended to invest any tribunal with an authority by which such an injustice could occur, without any default of the tenant who, as in this case, had complied with every requirement of the Act? This would certainly be maintaining the character which has been sometimes given to this Act, of being a despotic Act. But where the principles are to be found which would warrant such an interpretation being put on any Act of Parliament, I am at a loss to discover, nor can I see why such a construction should be put on any section in the present Act, instead of a construction of which it is quite capable, and which will be found consistent with its other provisions, and with the just rights of all parties. Why should this Act be construed in any way prejudicial to the rights of the tenants, if it be possible to avoid doing so? It was not enacted because lands were incumbered by leases, nor to give any facility to owners or incumbrancers to get rid of leases affecting incumbered estates; why should a tenant, or why should any man be affected by it, who does not hold land subject to an incumbrance, or otherwise than so far as it is so subject?

I have hitherto dealt with this case upon arguments derived from the language and provisions of the Act itself; but I come now to consider it on the ground of authority. I refer to the case of *Annesley v. Dixon*, a decision of the greatest weight. The Act of Parliament upon which that case was decided (11 & 12 W. 3, c. 2, *Ir.*) is, in its language and provisions, so very similar in many respects to that which is now before us, that one might almost suppose it had been adopted as a precedent. That Act vested all the estates forfeited in the rebellion in trustees, as Commissioners for the purpose of sale. By the 8th section, ample powers were given to the Commissioners to obtain information, by seeking for papers, books, writings or records, as they might think necessary; and powers to examine upon oath, for the purpose of ascertaining persons who were attainted or convicted, and of dis-

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covering their property. By the 12th section, all persons having claims were to come in; and powers were given to the Commissioners, as a Court of Record, to adjudicate on those claims; and in case no claim was made, or, being made, was decided against, the Commissioners were to sell. By the 16th section, every judgment or decree of the said Commissioners, when entered of record, was made final and conclusive, and binding on all and every person or persons, their heirs, successors, administrators and assigns, notwithstanding any disability, and on all corporations and bodies politic. The 23rd section provides for the conveyance which was to be executed by the said Commissioners; and then comes the 25th section, which constitutes the purchaser's title: and thereby it is enacted "That any purchaser having any such conveyance and assurance as aforesaid shall be adjudged to be in the actual seisin and possession of the lands so purchased and conveyed; and the trustees are hereby authorised to issue their precept to the Sheriffs to give possession, and every such purchaser shall hold and enjoy the same for such estate and interest therein as shall be conveyed by such indenture, freed and discharged from all arrears of quit-rent, crown-rent and chiefries, and of and from all other claims and demands of his Majesty, his heirs and successors, and of the said Commissioners, and of all and every other person and persons whatsoever, other than and except such claims and demands as shall be allowed by the said Commissioners on the examination of such claims as aforesaid." It is impossible to conceive any words stronger or more conclusive than these, to give the purchaser what is called a parliamentary title.

And let us now see how they were dealt with. A claim was duly made by Dixon, the owner of the estate which the Commissioners had sold and conveyed to Annealey as a forfeited estate. The claim was heard before the Commissioners, who decided against Dixon. He then brought an ejectment against Annealey, in the Court of King's Bench, which decided in his favour. The judgment was affirmed upon a writ of error to the King's Bench in England, then presided over by Lord Holt; and that judgment was affirmed in Parliament. Now, in that case I find that the words "such indenture" (used in the Act for Sale of Forfeited Estates, and

exactly analogous to the words "such conveyance" in the Incumbered Estates Act) were held to mean a conveyance of such estates as the Commissioners had power to sell and to make title to; and I find that because the estate which the Commissioners had there sold was not, in point of fact, a forfeited estate, though they received and had in their possession Mr. Annesley's purchase-money, still their conveyance of it went for nothing, on the ground that they had not jurisdiction. And where, I ask, is the difference between that and the case now before us? The Act of W. 3 gave a jurisdiction over forfeited estates, and the estate the Commissioners sold was not forfeited. Here there is a jurisdiction given over incumbered estates, and the estate the Commissioners sell is not an incumbered estate. Why is the conveyance here to have a magical effect which was denied to the conveyance in that case?

And now I shall read a few of the concluding passages of the judgment of that eminent man Chief Justice Holt. He says:—"I think the proceedings and decree of the trustees in this case are void, and *coram non Judice*, and that the lessor of the plaintiff had a good title to enter; and I do agree with my Brother Powell, that any other construction of this Act would be, instead of quieting Ireland, the ready way to have a new war there. *It was intended* that the *forfeited* lands, and those belonging to King James, should be vested in these trustees, in order to be sold to the public; and instead of this *we would vest all the kingdom in them*. "This would be a mad construction." A construction which would enable them to sell anything but forfeited estates, Lord Holt considers would be a mad construction. He says then:—"I know none of the trustees; they may be honest gentlemen for aught I know. I take this Act, as it was made and intended, to have a very reasonable construction and interpretation. If King James had been a disseisor, as my Brother Powell said, the possession and defeasible estate is vested in the trustees. If the forfeiting person had a right of action or entry, this was vested in the trustees; *but the possession of the lands of an innocent person is undisturbed by the Act*; so if a tenant for life was a forfeiting person, this estate was in the trustees, but not the reversions in remainder." The case now before the Court presents the converse of that proposition.

E. T. 1857.  
*Exch. Cham.*  
 HERRINGTON  
 v.  
 BORKE.



E. T. 1857. The tenant's interest in possession is not subject to an incumbrance, *Exch. Cham.*  
 ERRINGTON although the reversion is; and the principle laid down by Lord  
 v. Holt equally applies.

MORKE.

I now come to the other branch of the argument which has been urged on behalf of the plaintiff, viz., that the omission to insert the defendant's lease in the schedule to the plaintiff's conveyance operates to defeat and destroy the lease, notwithstanding the previous order of the Commissioners, declaring that the lands were to be sold subject to that lease; and here I proceed to examine the provisions of the 23rd, 24th and 27th sections, relative to tenants' leases, and the powers given in respect of them. By the 23rd section it is enacted:—"That where a sale shall be made "under this Act, the Commissioners shall, where and so far as they "may deem necessary for the purposes of the sale, ascertain the "tenancies of the occupying tenants, and of any lessees or under- "lessees whose leases, under-leases, &c., affect the lands, or any "part thereof, to be sold, and may give such notices or make such "inquiries as they may think necessary for ascertaining and securing the rights of such tenants, lessees or under-lessees, as aforesaid; and all occupying tenants, and all persons being or claiming "to be lessees or under-lessees as aforesaid, shall, at such times and "places as the Commissioners may by their notices require, produce "all leases, under-leases and agreements in writing, under which "such tenants or persons occupy or claim to hold, if such leases, &c., "be in their power or possession; and if not so, then the particulars of the terms, &c., subject to which they occupy or claim to "hold; *and the sale shall be made subject to the tenancies, leases "or under-leases ascertained as aforesaid, subject to which the "owner or incumbrancer applying for a sale under this Act shall "be owner or incumbrancer,* and such other of the tenancies, leases "and under-leases, ascertained as aforesaid, as shall appear to the "Commissioners to have been granted *bona fide* by the owner or "persons in possession or receipt of the rents and profits subject "to which it shall appear to the Commissioners the sale should be "made."

The first thing to be observed in this section is the expressed purpose for which the inquiry directed is to be made; it is for the

purpose of ascertaining and *securing* the rights of such tenants, E. T. 1857.  
lessees or under-lessees, as aforesaid; that is, of ascertaining the *Exch. Cham.*  
tenancies of all the occupying tenants, and *securing* the rights of *ERRINGTON*  
those *whose rights affected the lands to be sold*: and accordingly, *v.*  
the section proceeds to direct that the sale shall be made *subject* *BORKE.*  
to the tenancies, leases or under-leases ascertained as aforesaid,  
subject to which the owner or incumbrancer applying for a sale  
shall be owner or incumbrancer, and *such* other of the tenancies,  
leases, &c., ascertained as aforesaid, as shall appear to the Com-  
missioners to have been granted *bona fide* by the owner or person  
in possession or receipt of the rents, subject to which it shall appear  
to the Commissioners the sale ought to be made. Now, here the  
two classes of tenancies are distinguished; and the distinction  
between them is very important to attend to, with a view to the  
“defendant’s case before the Court—the first consisting of leases, &c.,  
subject to which the owner or incumbrancer applying for a sale was  
subject as such; the second class, such as having been only granted  
by the persons in possession, but *bona fide*, the Commissioners  
*might think* should not be disturbed, but the sale made subject  
to them. As to the first class, the section is imperative; the  
sale must be made subject to them; there is no discretion left  
to the Commissioners. As to the second class, it is left wholly to  
their judgment and discretion to which and how many of them the sale  
should be made subject. The first class stand *proprio vigore*. The  
land being charged with them, and the incumbrance being subject to  
them, it would require express enactment to annul them; instead of  
which the Act expressly recognises them, and directs that the lands  
should be sold subject to them. Then comes the 24th section, by  
which it is enacted “That the conveyance to be executed by the  
“Commissioners shall express or refer to the tenancies, leases or  
“under-leases (if any) subject to which the sale is made.” This is  
a provision altogether for the benefit of the tenants, whose leases it  
was the object of the 23rd section to secure. The omission to  
comply with this direction, however it might be a defect in the  
conveyance, could not possibly affect or defeat the pre-existing right  
of the tenant, subject to whose lease a sale could only be made.

E. T. 1857.  
*Exch. Cham.*  
 ERRINGTON  
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I come next to the 27th section; and the language there used appears to me strongly to favour the view I have been submitting; for not only do the words "*such* conveyance" necessarily refer back to sections 23 & 24, but in addition to this, it is expressly enacted "That the conveyance shall be effectual to pass the fee-simple of "the lands, *subject to such tenancies, leases and under-leases* as "shall be expressed or referred to therein *as aforesaid*"—assuming, of course, that the Commissioners had done their duty by inserting those leases subject to which the Act had expressly provided that the sale should be made by the enactments I have referred to in the 23rd and 24th sections. When the Legislature speaks of the conveyance executed by the Commissioners, surely they must be intended to speak of a conveyance executed according to law. We are not to interpret this Act as an Act passed to protect purchasers, regardless of the protection of tenants whose rights were prior and paramount to the Act; and looking at it in this view, we must, as between parties claiming protection under the same Act, apply the rule "*qui prior est tempore potior est jure*."

It now only remains shortly to notice the 49th section of the Act, upon which the plaintiff's Counsel have also relied. It might be sufficient to observe that though this section makes the conveyance of the Commissioners conclusive evidence of all matters therein mentioned, yet it expressly, and in terms, only applies to a conveyance "*executed as required by this Act*," and therefore comes within all the observations I have already made upon the previous sections. But I may also add that the concluding part of the 49th section, enacting "that no such conveyance shall be impeached for any *informality* therein," seems to afford a strong inference that although *informalities* could be cured, the Legislature never intended to prevent *substantial error* being shown.

Upon the whole of the case, therefore, my opinion is that the judgment given below was right and should be affirmed; but the other Judges being of a different opinion, the judgment below must be reversed, and a *venire de novo* awarded.

*Venire de novo.*

E. T. 1856.  
*Common Pleas.*

## DOUGLAS v. EWING.

(*Common Pleas.*)

April 17.

THIS was an action for trover, tried before the CHIEF JUSTICE of the Common Pleas, at the Sittings after Michaelmas Term 1855. The summons and plaint stated that the defendants, on the 18th of August 1855, converted to their own use 117 pieces, containing about 11,230 yards, of linen drills, the goods of the plaintiff, of the value of £253.

Pleas.—First, that the defendants did not convert to their own use any goods of the plaintiff, as alleged.

Second.—That the goods were not the goods of the plaintiff at the time of the conversion.

Third.—That before the time of the alleged conversion, to wit, on the 11th of August 1855, one Robert Wilson was an agent entrusted by the plaintiff with the possession of the said goods, within the true intent and meaning of a certain Act of Parliament passed in the 5th and 6th years of the reign of her present Majesty, in such case made and provided; and whilst the plaintiff was such owner as aforesaid, and whilst the said Robert Wilson was such agent as aforesaid, the defendants did *bona fide* make an agreement with the said Wilson for the advance of £170, to be secured, with interest and commission thereon, by a deposit and pledge of the said goods with the defendants; and that the said Robert Wilson did, in pursuance of the said agreement, deliver said goods to the defendants, who thereupon, and upon the security thereof, did advance to the said Robert Wilson the said sum of £170; and the defendants further say that the said sum of £170, together with commission and interest thereon, is still due and owing by the said Robert Wilson to the defendants, and that they retain the said goods

Where the case made by the plaintiff at the trial was a surprise on the defendants, the Court granted a new trial, though no objection to the Judge's charge had been taken by the defendants at the trial.

Where, from a manifest error in one of the pleas, it was impossible to try the entire question between the parties, the Court allowed the plea to be amended at the trial, on the condition of the plaintiff being allowed to tender an issue on the defence as amended.

E. T. 1856. as a security or lien for the said moneys, which is the alleged  
*Common Pleas.* conversion in said summons and plaint mentioned.  
 DOUGLAS  
 v.  
 EWING.

The following were the issues to be tried.

First.—Did the defendants convert to their own use the said linen drills, or any part of them?

Secondly.—Were the said linen drills, or any part of them, the plaintiff's goods at the time of the alleged conversion?

Thirdly.—Did the defendants *bona fide* make or enter into a contract or agreement with the said Robert Wilson for the advance to the said Robert Wilson of the sum of £170, to be secured, with interest and commission thereon, by the deposit and pledge of the said linen drills with the said defendants?

Fourthly.—If *qo*, did the defendants afterwards, upon receiving the said linen drills from the said Robert Wilson, and upon the security thereof, advance to the said Robert Wilson the sum of £170?

At the trial, the plaintiff's case was, that he had never entrusted the goods to Wilson as an agent, within the meaning of the Factors Act; but that Wilson had falsely and fraudulently represented to the plaintiff that he, Wilson, wanted the goods for the purpose of negotiating a sale with certain parties from Ballymena, whom he expected to meet in the market of Belfast, alleging that the said parties would give the price demanded by the plaintiff. The plaintiff himself was examined as a witness, and stated that Wilson's representation as to the purchasers from Ballymena was a falsehood, made use of for the purpose of persuading the plaintiff to part with the possession of the goods, and that the delivery of the goods to Wilson, under the circumstances, was not an entrusting them as agent, within the meaning of the Factors Act. Wilson was in attendance, upon the plaintiff's *subpoena*, but was not examined by either party, the defendant regarding him as the agent of the plaintiff. When the jury had retired, the defendants' Counsel suggested the propriety of examining Wilson. His Lordship concurred in that view; but the plaintiff's Counsel refused to let Wilson be examined. It appeared that Wilson had continued to reside in Belfast, and that the plaintiff

had taken no steps against him, on the ground of the alleged fraud. The learned Judge directed a verdict for the plaintiff, and the jury accordingly found for him upon all the issues, except the third. They also found that Wilson had obtained the goods from the plaintiff fraudulently and by false pretences.

A conditional order for a new trial having been subsequently obtained, on the ground of surprise and misdirection—

*Joy* (with him *S. Ferguson*) now showed cause.

The Court will not grant a new trial for the purpose of allowing a party to make a case which he might have made at the trial: *Vernon v. Hankey* (a); *Cook v. Berry* (b); *Harrison v. Harrison* (c); *Dickenson v. Blake* (d); *Bell v. Thompson* (e). Wilson was not an agent within the meaning of the 5 & 6 Vic., c. 39 (Factors Act).

The following cases were also cited: *Load v. Green* (f); *Irving v. Motly* (g); *Wilkinson v. King* (h); *Earl of Bristol v. Wilmore* (i); *Roscoe on Evidence*, p. 504; *White v. Spettigus* (k).

*Fitzgibbon, Macdonogh* and *M. Harrison*, contra.

An objection to the Judge's charge may be relied on now, though not made at the trial: *Murphy v. Harris* (l); *Knight v. Egerton* (m); *Toulmin v. Hedley* (n). The Judge should have allowed the amendment and new issue at the trial: *Buckland v. Johnson* (o); *Wilkin v. Reed* (p). The following authorities show that a verdict should have been directed for the defendant: *White*

(a) 2 T. R. 113.

(c) 9 Pri. 89.

(e) 2 Chit. Rep. 194.

(g) 7 Bing. 543.

(i) 1 B. & C. 514.

(l) Bat. 206.

(n) 2 Car. & K. 157.

(b) 1 Wils. 98.

(d) 7 B. P. C. 177.

(f) 15 M. & W. 216.

(h) 2 Camp. 335.

(k) 13 M. & W. 603.

(m) 7 Exch. 407.

(o) 15 C. B. 145.

(p) 15 C. B. 192.

E. T. 1856. *v. Garden* (a); *Sheppard v. Shoolbred* (b); *Parker v. Patrick* (c);  
*Common Pleas.* *Davis v. Morrison* (d).  
 DOUGLAS  
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*S. Ferguson*, in reply.

No objection was taken at the trial to the Judge's charge. The 90th General Order declares that Counsel's certificate shall state the facts upon which the motion for a new trial is grounded. The verdict in this case was strictly in accordance with justice. There should be a doubt that justice has been done before a new trial is granted: *Bright v. Eynon* (e). He also cited *Doe v. Power* (f); *Kirwan v. Tully* (g); *O'Brien v. Doolan* (h); *Regina v. Robins* (i); *Martin v. The Great Northern Railway Company* (k).

MONAHAN, C. J.

In this case the defendants seek to have the verdict set aside upon two grounds: first, on the ground that there has been a miscarriage, because, even assuming the facts as found by the jury to be true, I ought to have directed a verdict for the defendants; secondly, on the ground that the case made at the trial by the plaintiff, namely, that Wilson had obtained the goods from the plaintiff by fraud and false pretences, came upon the defendants by surprise; and an affidavit has been made that, if the case were tried again, the defendants would be able to prove that Wilson had obtained the goods from Douglas *bona fide* as a purchaser. To this two answers are given: first, that at the trial no objection was taken to my charge; secondly, that the surprise complained of was not really such in point of law, and that therefore the defendants should be precluded from raising that objection now. The circumstances of this case, which are somewhat peculiar, will probably enable us to dispose of it without infringing upon any rule of law. The summons and plaint was what would

(a) 10 C. B. 919.

(b) Car. & Mar. 61.

(c) 5 T. R. 175.

(d) Loft. 185.

(e) 1 Bur. 393.

(f) 3 Ir. Law Rep. 438.

(g) 1 Cr. & D., Ab. N., 388.

(h) 1 Leg. Rep. 198.

(i) 1 Dears., C. C., 418.

(k) 16 C. B. 179; S. C., 24 Law Jour., N. S., C. P., 209.

have been, under the former system of pleading, a declaration in trover. There were three pleas, viz., a traverse of the conversion; a traverse of the plaintiff's property in the goods; and a special plea under the Factors Act. A mistake was made in the pleading of the special plea, which, as it at first ran, was, that the said Robert Wilson did *bona fide* enter into the said agreement. This was palpably a slip, ascribing the *bona fides* to the wrong party. However, no objection had been made on the part of the defendants to the issues furnished by the plaintiff. Those issues were, first, whether the defendants converted the goods? Secondly, whether the goods were the goods of the plaintiff at the time of the conversion? Thirdly, whether Wilson *bona fide* entered into an agreement with the defendants for an advance upon the goods? and fourthly, whether the defendants made the advances? There was no issue tendered as to whether Wilson was an agent within the meaning of the Factors Act. At the trial it occurred to me that I could not try the case as the pleadings then stood; and as it was evident that an amendment must be eventually made, in order to eliminate the real question between the parties, I made an order, allowing the defendants to amend their special plea. The plea was accordingly amended, and the issue then taken was, did the defendants *bona fide* enter into an agreement with Wilson for the advances? We entertain no doubt that I was right in allowing the amendment, and also in allowing an issue to be taken by the plaintiff upon the amended plea.

The plaintiff then proceeded to prove his case. He was examined as a witness on his own behalf, and stated that he was the owner of the goods in question; that Wilson had, by false pretences, obtained the goods from him, for the alleged purpose of selling them to a third person. Wilson was in Court, on the plaintiff's *subpoena*, but was not examined. It was virtually admitted at the trial, that if Wilson obtained the goods by fraud, he could not confer any title on the defendants; and acting on this admission, and not recollecting the cases on the subject, I directed a verdict for the plaintiff. No objection was made at the time to my charge.

E. T. 1856.  
*Common Pleas.*  
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It is plain that the case of *White v. Garden* (a) was overlooked by the Counsel at both sides, nor was my attention directed to that case; and the question now is, should the defendants, under those circumstances, be precluded from raising the point? The point of law came upon them by surprise; it could not have arisen before the trial, and a document came from the hands of Mr. Ewing, establishing the fact that the plaintiff had, on his own statement, dealt with Wilson as his commission agent. Therefore it cannot be said that Ewing was in any default in coming to trial unprepared to meet a point of law which he could not know would be raised. The case of *Murphy v. Harris* (b) is an authority showing that a new trial may be granted, even though the objection relied on was not raised at the trial; and therefore if the present case comes within *White v. Garden*, it is exactly like the case in *Batty*. But was there any surprise in matter of fact? As to that there is some doubt, but the substance of Mr. Ewing's affidavit is that he had no means of knowing that it would be alleged that Wilson had obtained the goods by false pretences and fraud.

Under these circumstances, we think that this case does come within the doctrine of surprise, and that the surprise in this case was induced by the acts of the plaintiff. Therefore, upon the whole case, we are of opinion that a new trial should be granted, but on the payment of the costs of the former trial.

(a) 10 C. B. 919.

(b) Bat. 206.

T. T. 1856.  
*Common Pleas.*

## HOLMES v. HENNEGAN.

*May 27.*

EJECTMENT for non-payment of rent, to recover possession of the lands of Derrygrave, in the county of Cork. The lands in question had been the fee-simple property of the plaintiff's wife before her marriage. The husband, seised in right of the wife, was the sole plaintiff on the record. The demise had been made by an ancestor of the wife. At the trial, before Mr. Justice BAILL, at the Cork Spring Assizes 1856, the defendant's Counsel called upon the Judge to nonsuit the plaintiff, on the ground that the wife was a necessary party to the action. The learned Judge refused to do so, but directed a verdict for the plaintiff, reserving liberty to the defendant to move to have a nonsuit entered, if the Court should be of opinion that the plaintiff's wife was a necessary party to the record. A conditional order for a nonsuit having been obtained, in accordance with the leave reserved—

A husband may bring an action of ejectment for non-payment of rent in his own name alone, where the lands had been the fee-simple property of the wife before coverture, and the rent had accrued on a demise made by the wife's ancestor. The wife is not, in such case, a necessary party.

Serjeant *O'Brien* (with him *Chatterton*) now showed cause.

The wife was not a necessary party. In 3 *Bac. Abr., Ejectment*, D, 3, it is laid down, "It is not necessary that the husband and wife "should join in a lease, to try the title to her estate; he alone may "make a lease for that purpose." *Jordan v. Wikes* (a) shows that a demise laid in the name of the husband alone was good. A husband may make a lease of the wife's lands during their joint lives. In 1 *Saunders on Plead. & Ev.* it is laid down, "If the right of entry "be in husband and wife, in right of the wife, the demise may be laid "either by husband and wife or by husband alone." The husband may make a tenant to the *præcipe* of the wife's estate, for the purpose of suffering a common recovery, without the wife joining him in a fine: 1 *Bac. Abr., Baron & Feme*, C. The husband may alone make *avowry* for rent, out of the wife's property, accrued due

(a) Cro. Jac. 332.

T. T. 1856. during the coverture: *Com. Dig., Baron & Feme*, X; *Broome*  
*Common Pleas.* on Parties, p. 237; *Gardiner v. Norman* (a); *Tracey v. Dutton* (b);  
 HOLMES v. *Parry v. Hindle* (c); *Wise v. Bellent* (d).  
 HENNEGAN.

*Deasy* and *Sir Colman O'Loghlen*, in support of the conditional order.

The wife must be joined in all real and mixed actions for the wife's freehold property: 2 *Com. Dig., Baron & Feme*, V. Before the recent practice, ejectment was a mixed action, real in respect of the lands, personal in respect of the damages: *Bac. Abr., Ejectment*, A. *Parry v. Hindle* was an action of replevin. The husband may avow for rent due to husband and wife, because the rent, when recovered, belongs to the husband. In the present case the rent accrues not on a demise by the husband, but on a demise by the wife's ancestor, and therefore the right of action would survive to the wife after the husband's decease. In 1 *Bac. Abr., Baron and Feme*, K, it is laid down, "In those cases where the debt or cause of action will survive to the wife, the husband and wife are regularly to join in the action." *Dunstan and Wife v. Burwell* (e); 4 *Vin. Abr., Baron & Feme*, Q & R, 15; 4 *Vin. Abr., Baron & Feme*, Tt; *Brett v. Cumberland* (f); *Costrell v. Moore* (g); in that case it was held that "*the Baron & Feme shall join in ejectione firma*."

*Chatterton*, in reply, was stopped by the Court.

MONAHAN, C. J.

The plaintiff in this case was quite competent to bring an action of ejectment in his own name, and the wife was not a necessary party. I believe that for the last century no one has doubted but that the husband has such an estate in the lands of the wife as to enable him to make a lease of her lands, for the purpose of bringing an ejectment. The present statute does not alter the law, and therefore we must allow the cause shown, with costs.

(a) Cro. Jac. 617.

(c) 2 Taunt. 180.

(e) 1 Wils. 224.

(b) Cro. Jac. 617.

(d) Cro. Jac. 442.

(f) Roll. Rep. 359.

(g) Lit. Rep. 285.

T. T. 1856.  
*Common Pleas.*

POLLOK and Wife v. KELLY and others.

May 31.  
 June 2.

THIS was an action of ejectment on the title, tried before Mr. Serjeant Howley, at the Spring Assizes 1856, for the county of Galway. The action was brought by the plaintiffs to recover possession of the lands of Boggauns, in the county of Galway, against the defendants Andrew Kelly, Michael Murray and Mary Brennan. The demise was laid on the 1st of November 1854. Andrew Kelly allowed judgment to go by default; Michael Murray took defence for four acres of the lands, and Mary Brennan took defence for seven acres.

At the trial, the plaintiffs gave in evidence a conveyance, dated the 24th of February 1854, made to them by the Commissioners of the Incumbered Estates Court, whereby two of the Commissioners conveyed to the plaintiffs certain townlands and denominations in the county of Galway, including the lands the subject of the present ejectment, "to hold the same unto the said Allen Pollok and Margaret Pollok, their heirs and assigns, for ever, as joint tenants thereof, subject, as to said several lands and hereditaments, to the tenancies referred to in the said schedule hereunto annexed."

In the schedule referred to, the tenants of the lands for which the ejectment was brought were described as "Andrew Kelly & Co.;"

and to distrain or bring actions for same; and also authorising him to take proceedings for the enforcing covenants in leases, and, for that purpose, to sign and serve notices to quit. The agent signed a number of blank notices to quit, and gave them to his clerk B., who brought them to the lands, filled them up there, and gave them to a bailiff to serve. The bailiff served the notices upon the tenants, but was only acquainted personally with Kelly. An ejectment in the names of A. P. and M. P. was then brought against Kelly and the other defendants. At the trial, B. the clerk swore that he had received instructions from A. P. himself.—*Held*, that the effect of the conveyance was to grant to the husband and wife an estate by entireties.

*Held also*—That the husband had such a legal estate in the lands as enabled him to serve notices to quit, and to determine tenancies, without the concurrence of his wife.

*Held also*—That the power of attorney did not give the agent a general authority to serve notices to quit.

*Held also*—That the statement of B. was evidence of a parol authority from A. P. to serve notices to quit, and that therefore the notice ought to have been received in evidence.

*Held also*—That service of a notice to quit upon one of several joint tenants is *prima facie* evidence of service upon them all.

By a conveyance from the Commissioners for the Sale of Incumbered Estates, certain lands were conveyed to A. P. and M. P. his wife, "to hold the same unto the said A. P. and M. P. for ever, as joint tenants thereof, subject to the tenancies referred to in the schedule hereunto annexed." In the schedule the tenants were described as "Andrew Kelly & Co., tenants from year to year." A. P. and M. P. executed a power of attorney, authorising their agent to collect and receive rents,

T. T. 1856. and the tenure was stated thus, "tenants from year to year, ten-  
*Common Pleas.* ancy determinable 1st of November."

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The plaintiffs then proved a power of attorney executed by them on the 4th of March 1854, whereby they appointed Croker Barrington their attorney and agent, with power to receive the rents and arrears of rents of their property in Galway, and to give receipts for the same; "And, in case of non-payment thereof, or any part thereof, respectively for us, or in our names, or otherwise, to employ and make use of all such lawful remedies, ways and means for the recovering and compelling payment of the same, either by entering into and upon the premises in respect of which such rent or arrears of rent shall become due, and distraining for the same, or by bringing actions against the tenants, lessees or occupiers of said lands and premises, or otherwise howsoever, as to him the said Croker Barrington shall seem meet and expedient; and to commence any actions or suits in any Court of Law or Equity, or other proceedings, which the said Croker Barrington may deem requisite or proper to enforce the performance of any covenant or covenants contained in any indenture of lease granted, or to be granted, of the said towns, lands or hereditaments; and for that purpose, when necessary, to sign, in our names or otherwise, notices to quit, and to serve and proceed upon, or, in his discretion, to waive the same; and the same actions or suits respectively to prosecute and follow up, or to discontinue, or otherwise to act therein as the said Croker Barrington shall deem expedient; and also by virtue of any powers contained in any leases under which the said lands, &c., are or may, from time to time, be held, enabling us, in that behalf or otherwise, to enter into and upon the said towns, lands, &c., and examine the state and condition thereof, and give the proper notices and directions respecting the repairs and cultivation of the same; and generally to do, and cause to be done, all and every or any other act, matter or thing whatsoever, in or about the premises aforesaid, which we could do or have done, if personally present; and also to substitute or appoint any person or persons to act under or in place of the said Croker Barrington, in all

"or any of the matters aforesaid, and every substitution at pleasure  
 "to revoke; we hereby ratifying and confirming all and whatsoever  
 "our said attorney, or his substitute or substitutes, shall lawfully do  
 "or cause to be done, in or about the premises aforesaid, by virtue  
 "of these presents. In witness, &c.—

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"MARGARET POLLOCK."

The plaintiffs then examined W. R. Redmond, clerk to Barrington, who proved that the signature "Croker Barrington" to a notice to quit, dated 1st of April 1854, then in witness's hands, was in the handwriting of Croker Barrington. The notice to quit demanded possession of the lands of Boggauns on the 1st of November 1854, and was directed to the defendants and four others, mentioning the names of each. The witness, on cross-examination, stated, *inter alia*, that he had gone from Dublin to Galway in March 1854, with the said notice to quit and several others in his possession; that when in Galway he had gone to one Michael Kelly, the former receiver over the lands, and had, together with one Burke, and in Kelly's presence, compared all the notices, and as many copies of each notice as there were names for service marked on each notice. All the notices to quit were signed by Croker Barrington before the witness filled them up; that he waited until they were served, and did not see Barrington between the time they were filled up and the time they were served, but showed him the notices after his return to Dublin. All the notices were blank, except Croker Barrington's signature. That the witness got some of the notices from Barrington himself, and some in the office, before he went to Galway; some of them were sent to him from Dublin. Barrington gave the witness directions to have notices to quit served on all the tenants, and told him that Kelly would give witness every assistance about them, and that "witness got instructions from Mr. Pollok himself."

The plaintiffs then examined William Burke, who stated that he knew that persons named Michael Murray and Mary Brennan were on the lands when the notices to quit were served; that he had

T. T. 1856. compared and served the notices he got from Barrett; that he  
*Common Pleas.* served Andrew Kelly personally on the 17th of April 1854, and  
 POLLOCK knew him at the time. Andrew Kelly's name was on the face of  
 v. the notice to quit. That he (witness) got that notice from Barrett,  
 KELLY. but could not tell what was in it. This witness stated, on cross-examination, that, at the time he served the notices, he had a man with him who pointed out the defendants, and the other tenants on plaintiff's estate; but he would not swear that the defendants' names were on the notice before he served it; he would not know Murray or Brennan.

Counsel for the plaintiffs then proposed to give said notice to quit in evidence; but Counsel for the defendants objected, and the learned Judge refused to allow said notice to quit to be read in evidence,\* and directed the jury to find a verdict for the defendants. There was a verdict for the defendants accordingly.

The case now came before the Court on a bill of exceptions to the learned Judge's ruling, on the ground that the said notice to quit ought to have been received in evidence.

[There were several other exceptions taken; but as they were quite unnecessary for the decision of the question in the case, they are omitted in this report].

*Concannon* (with him *Napier* and *James Robinson*), for the plaintiffs.

On the true construction of the 12 & 13 *Vic.*, c. 77 (Incumbered Estates Act), ss. 23, 24, 27 and 49, together with the 13th Rule of the Commissioners, the effect of the conveyance was, that Mr. and Mrs. Pollok held the lands in fee-simple, subject to the tenancies mentioned in the schedule. Under that conveyance they took as joint tenants, and therefore a notice to quit from one was sufficient, and the power of attorney given by Mr. Pollok to Croker Barrington was good. If, in a conveyance to husband and wife,

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\* NOTE.—The learned Judge's reason for refusing to admit the notice to quit in evidence was not assigned on the bill of exceptions.

there are words of limitation, denoting that they are to take not by entireties but in severalty, then those words must get their effect: *Co. Lit.*, p. 187 *b*; 1 *Bright on Husband and Wife*, p. 26. If husband and wife can take in severalty by express limitation, why may they not take as joint tenants by express limitation? They may take as tenants in common by express limitation: *Paine v. Wagner* (a); *Warrington v. Warrington* (b). A notice to quit by one of several joint tenants is good: *Smythe's Lan. & Ten.*, p. 610; *Furlong's Lan. & Ten.*, p. 597. But independently of that, the husband has, by force of his marital right, power to deal with the freehold during the life of the wife: *Bac. Abr., Baron & Feme*, c. 1; *Pigot on Recoveries*, p. 72; *Jordan v. Wikes* (c); *Tracey v. Dutton* (d); *Robertson v. Norris* (e). The test of the validity of the notice to quit in the present case is this—could Pollok have receded from it? The facts in *Lessee Wynne v. M'Eniry* (f), which was an ejectment brought by trustees, were very similar to those in the present case; and the Court held that there was sufficient evidence to go to the jury that the notice to quit had been served by the authority of the trustees. Service on one of the joint tenants is good: *Longfield on Ejectment*, p. 140; *Furlong's Lan. & Ten.*, p. 602; *Smythe's Lan. & Ten.*, p. 612. "Andrew Kelly and Co." constitutes either a joint tenancy or a tenancy in common. It cannot be the latter, for then they should take divided portions: *Watkins on Conveyancing*, p. 166; 2 *Cru. Dig.*, p. 364; 4 *Cru. Dig.*, p. 292; *Burton on Real Property*, p. 63. Mrs. Pollok's signature was valid: ——— *v. Hopkins* (g); *Cooper's case* (h).

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*W. Sidney and Fitzgibbon*, for the defendants.

The power of attorney gave no power to Barrington to determine this particular tenancy. It did not invest him with a general power to sign notices to quit. In *M'Intyre v. M'Nab's Trus-*

(a) 12 Sim. 184.

(b) 2 Hare, 54.

(c) Cro. Jac. 332.

(d) Cro. Jac. 617.

(e) 11 Q. B. 916.

(f) 1 Ir. Com. Law Rep. 435; S. C., 3 Ir. Jur. 330.

(g) Cro. Car. 165.

(h) 2 Leon. 200.



T. T. 1856. *tees* (a), Lord Lyndhust said :—" A person of the name of M'Intyre,   
*Common Pleas.* "who is a solicitor by profession, residing at Callender, was   
 FOLLOK "appointed, in consequence of the embarrassment of the lessor's   
 v. "affairs, factor, to receive and collect the rents; he was appointed   
 KELLY. "by an express and special authority for that purpose, to receive   
 "and collect the rents, and, in case of non-payment, to enforce   
 "payment. But he had not, by virtue of the power with which   
 "he was invested, any authority whatever to receive notices to quit.   
 "It appears to me therefore that any notice served upon him by the   
 "tenant, of an intention to quit, was not a sufficient notice to put   
 "an end to the term." Powers of attorney are strictly construed:   
*Hogg v. Snaith* (b); *Esdale v. La Nauze* (c); *Murray v. East*   
*India Company* (d). In 2 *Cru. Dig.*, p. 373, s. 45, the rule   
 as to joint tenancy is thus laid down :—" As there can be no   
 "moieties between husband and wife, they cannot be joint tenants;   
 "therefore where an estate is conveyed to a man and his wife, and   
 "their heirs, it is not a joint tenancy; for joint tenants take by   
 "moieties, and are each seised of an undivided moiety of the whole.   
 "But husband and wife, being but one person, cannot, during the   
 "coverture, take separate estates; therefore, upon a purchase made   
 "by them both, each has the entirety, and they are seised *per tout*   
 "and not *per my*; and the husband cannot forfeit or alien the   
 "estate, because the whole of it belongs to his wife and not to him."   
*Right v. Cathell* (e); *Doe d. Aslin v. Summersett* (f); *Doe d.*   
*Lyster v. Goldwin* (g); *Doe d. Mann v. Walters* (h).

*Napier*, in reply.

Supposing that the plaintiffs took by entireties, under the conveyance, then their case is even stronger than if they took as joint tenants, for if they took by entireties, the whole authority was in the husband: *Henstead's case* (i).

(a) 5 Wils. & Shaw, 299.

(b) 1 Taunt. 347.

(c) 1 Y. & C., Exch., 394.

(d) 5 B. & Ald. 204.

(e) 2 Smith, 83; S. C., 5 East, 491.

(f) 1 B. & Ad. 135.

(g) 2 Q. B. 143.

(h) 10 B. & C. 626.

(i) 5 Coke, 10 b.

The following authorities were also cited: *Watkins on Conveyancing*, p. 177; 1 *Wms. Saunders*, 276*f* (note); *Doe d. Stace v. Wheeler* (a); *Doe d. Rhodes v. Robinson* (b); *Robinson v. Comyns* (c); *Doe d. Macartney v. Crick* (d); *Doe d. Bradford v. Watkins* (e); *Irish Society v. Bishop of Derry* (f); *Doe d. Waithman v. Miles* (g); *Sewell v. Evans* (h).

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MONAHAN, C. J.

The question to be decided in the present case is a simple one, namely, whether at a particular stage of the trial a notice to quit should have been received in evidence? The exception which raises this point is the only one upon which we need give judgment. There are ten or eleven other exceptions, but I confess I do not understand why they were taken; for if the Judge was right in refusing to admit this document, then the other exceptions should be overruled as a matter of course; therefore we shall consider this one exception only.

The facts of the case are substantially these:—An action of ejectment was brought in the name of Mr. and Mrs. Pollok against the defendants, as overholding tenants. One of the defendants, Kelly, allowed judgment to go by default, and the two others took defence, each for a separate portion of the lands. At the trial, Mr. Pollok proved, by a conveyance from the Commissioners of the Incumbered Estates Court, that the property had been conveyed to him and his wife “as joint tenants.” We are of opinion that the operation of that conveyance was to grant to Mr. and Mrs. Pollok an estate by entireties; for to speak of a grant to a husband and wife as an estate of joint tenancy is, properly speaking, a solecism.

Now, on the face of the conveyance, it appears that the plaintiffs were to hold the property subject to the tenancies referred to in the schedule; and in the schedule it appears the lands of Boggauna, the subject-matter of the ejectment, consisting of 76a. 3r. 4p., were

(a) 15 M. & W. 623.

(c) *Cas. temp. Talbot*, 167 n.

(e) 7 East, 550.

(g) 1 Stark. N. P. 181.

(b) 4 Scott, 396.

(d) 5 Esp. 196.

(f) 12 Cl. & Fin. 665, 673.

(h) 4 Q. B. 626.

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held by "Andrew Kelly & Co.," at a bulk rent of £19. 0s. 6d., as tenants from year to year; the tenancy being determinable on the 1st of November in each year. The schedule did not state the names of the other tenants, or in what manner they held, whether as joint tenants, or tenants in common *inter se*. The next step in the proof of the plaintiffs' case was a power of attorney, executed by Mr. and Mrs. Pollok, but void as far as she was concerned, as a married woman cannot execute a power of attorney, and operating, therefore, as if it were a power of attorney executed by the husband alone. This power purports to authorise Mr. Barrington to demand and receive rents, and in case of non-payment of rent, to recover the same by distraining or bringing actions. It also authorised him to take proceedings at Law or in Equity for the purpose of enforcing the performance of any covenants contained in the tenants' leases, "and for that purpose, "when necessary, to sign in our names or otherwise, notices to quit, and to serve and proceed upon, or in his discretion to waive, "the same," &c. But it clearly did not authorise him to serve notices to quit in this particular case; and therefore if his authority to serve notices to quit in the present case depended upon the power of attorney alone, he certainly would have had no such authority. But it appeared upon the examination of Barrett, who was a clerk of Mr. Barrington's, that he, Barrett, got from Barrington several blank notices to quit, signed by Barrington, and directions to take the blank notices to Galway, and to go to one Michael Kelly, who would give him the names of the tenants, and he was then to fill up the notices and serve them. He accordingly, acting upon these instructions, filled up and served several notices to quit, and had one, among others, served upon Andrew Kelly. It further appeared that there was evidence of Barrett's having got a parol authority from Pollok himself; and I may mention that we ground our decision chiefly upon this part of the case.

Now, under these circumstances, the question is, was there authority to serve these notices? All the parties at the trial appear to have been under the impression that the power of attorney was the sole authority, and the objection made was that Mrs. Pollok's

concurrence in the notices to quit was necessary, and that she being a *feme covert*, the power of attorney was void as to her. We are of opinion that Mrs. Pollok's concurrence was not necessary. We think that when a married woman has property in her own right, her husband has such an estate in right of his wife as would enable him to convey a freehold to a third person during the joint lives of the husband and wife, and that he has such a legal estate as that he could convey a legal estate to a third person, and make him tenant to the *præcipe* when recoveries were the modes of conveying property. We are of opinion that any person who has the present legal estate can serve such a notice as the one before us. The question is, can he do so without the concurrence of his wife? We think it is perfectly clear that he can, or that his lessee can. We do not now mean to determine what the effect would be of the death of the husband before the period when the notice to quit expired: all we have to consider is, whether, as the husband has survived that period, and as his legal estate is in full existence, it was not such a notice as would determine the tenancy.

It is said that the moment the notice to quit is served, it should be binding on the tenant. The same consideration arises in a case with which we are all conversant:—Suppose a property held subject to tenancies from year to year, and demised to another *pur autre vie*; in that case it is undeniable that the middle-man may determine the pre-existing tenancies. One of the cases cited for the defendants has actually ruled this point; I allude to the case of *Doe d. Lyster v. Goldwin (a)*. In that case the plaintiff had mortgaged the premises, to secure payment of an annuity. The mortgage contained a clause that the mortgagor was to remain in receipt of the rents and profits until default in the payment of the annuity. The premises were, at the time of the mortgage, in possession of a tenant from year to year, to whom the mortgagor afterwards gave a notice to quit, in his own name. The question was, whether that notice was valid? The Court held that the deed operated as a re-demise to the mortgagor, and that he, being tenant until default made in payment, had such an estate as enabled him

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(a) 2 Q. B. 143.

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... notices to quit, and that therefore the notice was good. ... we are of opinion that the plaintiff Mr. Pollok, in the ... case, had such an estate as enabled him to serve notices to quit, in his own name.

Therefore the only question that remains for our consideration is this—was there any evidence that these notices were issued and served by his authority, and that they were served on the proper parties? If the question of authority depended upon the power of attorney alone, that certainly did not authorise these notices; for it only authorised the collecting of rents, distraining, &c., for same, and the taking proceedings to enforce covenants, and for that purpose the serving of notices to quit; but certainly did not authorise either the creation of tenancies or a general serving of notices to quit, in order to determine tenancies. But it is to be remembered that the question is not whether there was conclusive evidence that the service of these notices was authorised by Mr. Pollok, but whether there was any evidence to that effect? Now what was the evidence upon that point? Barrett stated that he brought down the notices in blank, signed by Barrington; "Witness got some of the notices from Croker Barrington, and more of them in the office, before he went to Galway; some of them were sent to witness from Dublin. Witness had a conversation with Croker Barrington about the notices which witness got. Barrington gave witness direction to have notices to quit served on all the tenants; to do them correctly, according to the best of witness' ability. Witness got directions to have those notices served, and that Kelly would give witness every assistance about them. *Witness got instructions from Mr. Pollok himself.*" What is the fair construction of that, but that he got the instructions as to *these* notices from Pollok himself? It was for the jury to judge of the conclusiveness of that evidence. We are not now reading a legal document, but the report of the Judge who tried the case; and certainly the plain inference to be drawn from the evidence, as it appears on that report, is that Pollok personally gave instructions to have these identical notices served, and that Barrett acted upon instructions received both from Barrington and from Pollok himself.

It has been urged that a tenant, when served with such a notice, would have great difficulty in knowing whether it was binding or not. That difficulty might arise in every possible case; but the meaning of the rule, that it must be a reciprocally binding notice, is not that the tenant must know that it has been authorised by the landlord, but that it has been in fact so authorised.

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The only remaining question then is, was there any evidence that this notice was served upon all persons upon whom it ought to have been served? and if not, should it on that ground have been rejected? Now we are of opinion that if the notice was a link in the chain of evidence necessary to establish the plaintiffs' case, it ought to have been admitted, and that a Judge ought not to reject a document merely because it does not establish the plaintiff's entire case at the moment it is offered. Take it for granted that in the present case it was necessary to prove service upon all the parties comprised under the designation "Kelly and Co.," still that could be only proved by steps, and would be no reason for rejecting this document at the time, although afterwards, on failure of proof of further service, it might be necessary to tell the jury not to take it into account.

The evidence shows that this property was conveyed subject to tenancies, at a bulk rent, held by "Andrew Kelly & Co." There is no evidence, beyond the notice to quit, to show who the parties represented by the word "Co." were; but the fact that some of the parties chose to take defence cannot alter the estate of the landlord.

The cases which have been cited show that service of a notice to quit upon one joint tenant, if it be not conclusive evidence, is at least some evidence of service upon them all. I do not place any reliance upon what subsequently passed between the landlord and Andrew Kelly.

Upon the whole case, I have no doubt that this exception as to the rejection of the notice to quit must be allowed, and a *venire de novo* awarded. As to the other exceptions, let them be set aside; they were quite unnecessary.

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In the ruling and the reasons of the CHIEF JUSTICE I entirely concur. It appears to me that the fact that the power of attorney was admitted in evidence without objection fully shows that no objection could be properly sustained to the admission of the notice to quit. It was urged that the execution of the power of attorney by the wife was a nullity; nevertheless the parties felt they could not object to its admission, because it was a step in the plaintiffs' case. Was not the notice to quit admissible on the very same grounds?

KEOGH, J.

I also entirely concur in the judgment pronounced by the CHIEF JUSTICE, and feel that I cannot add anything to what he has said. I shall merely observe that, as to the reception of the notice to quit, I do not think there can be stronger evidence that Mr. Pollok authorised the service of the notice, than Barrett's answer—"I got instructions from Mr. Pollok himself." Therefore I am clearly of opinion that there was evidence of that authority to go to the jury.\*

\* JACKSON, J., absent in the Consolidated Court of Nisi Prius.

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A plea of justification in libel need not necessarily meet the exact words of the libel; but may adopt the sense of the innuendo, and justify that. Therefore, where a count in libel complained that the defendant had published of the plaintiff the following words:—"How he next appeared in Buncrana as curate and tutor; how he gave out, while there, that he was a graduate of Oxford; a *Captain of Dragoons*, &c. (meaning that the plaintiff had been guilty of wilful falsehood and misrepresentation of facts); and the defendant pleaded that the plaintiff had falsely represented that he was a graduate of Oxford, and had been a *surgeon in the navy*," &c., the plea was, on demurrer, *Held* to be good.

"he (meaning the plaintiff) gave out while there that he (meaning the plaintiff) was a Captain of Dragoons, a graduate of Oxford, &c., and attempted to pawn the poetry of American and British poets on the public as his own (meaning that the plaintiff, as an ordained minister of the Church of England, had been guilty of wilful falsehood and misrepresentation of facts.)"

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To this portion of the plea, the defendant pleaded the following justification:—"And as to so much of the said first paragraph of the summons and plea as complains of the words following"—(the plea then set out the above portion of the plea, including the innuendoes)—"the defendant says that the said plaintiff afterwards obtained a curacy at Buncrana, and represented to divers persons in said parish that he was a graduate of the University of Oxford, and that he had been a surgeon in the navy, all which representations were and are untrue." The plea then set forth several instances of the plaintiff's having represented and published, as his own, the compositions of certain American and British poets. The plea did not aver that he had ever represented himself as a Captain of Dragoons.

To this a demurrer, on the ground that the plea did not justify all the libellous matter imputed.

*D. McCausland*, for the demurrer.

The plea is bad: it professes to justify, and it leaves part of the libel unjustified, namely, that the plaintiff had falsely represented himself to be a Captain of Dragoons.

*J. Sherlock* and *J. E. Walshe*, contra.

The innuendo only attributes to the libel that the plaintiff had been guilty of making false representations; and the plea justifies by setting out a number of instances of false representations made by the plaintiff, some of which are the same as those set forth in the alleged libel, and some are different. That is a justification of the sting of the libel.

*D. McCausland*, in reply.

In 1 *Wms. Saunders*, p. 244 *b*, note *g*, it is laid down:—"But



**M. T. 1856.** "the justification must, it should seem, extend to every part which  
*Common Pleas.* "would by itself form a substantial ground of action for defama-  
**O'CONNOR** "tion." In *Hilsden v. Mereer* (a), it was held that saying a woman  
**v.** is a thief, and hath stole £20, cannot be justified by pleading that  
**WALLEN.** she stole a hen. He also cited *Clarkson v. Lawson* (b).—[MONAHAN, C. J. If the inuendo said, "meaning thereby that he falsely stated that he was a Captain of Dragoons," the case might be different; but here the inuendo only attributes the meaning that the plaintiff had been guilty of misrepresentations generally.]—Can a party charge another with saying something which was not true, and justify by proving that the other had said something else which was not true?—[MONAHAN, C. J. The plaint itself, by the inuendo, makes false representation generally the sting of the libel.—KEOGH, J. You say he charges with being an habitual misrepresenter of facts, and he justifies that by setting out instances which, if true, show that you were so.]

MONAHAN, C. J.

We are of opinion that this demurrer must be overruled; not upon the ground that a defendant may justify one charge by proving the plaintiff to have been guilty of another offence of the same kind, but upon the ground that the summons and plaint in this case, by its inuendo, made false representation generally the sting of the libel. Modern authorities show that a plea of justification need not necessarily be framed so as to meet the exact words of the libel, but may adopt the sense of the inuendo, and justify that. Therefore, if the plaintiff himself, by the inuendo, attributes to the words of the libel the meaning that he had been guilty of misrepresentation generally, a plea showing that he had been so guilty of misrepresentation generally is a good plea, although some of the instances adduced are different from those set forth in the libel.

BALL, J., JACKSON, J., and KEOGH, J., concurred.

Demurrer overruled.

(a) Cro. Jac. 677.

(b) 3 M. & P. 605.

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## BYRNE v. ELLIOTT.

Nov. 4, 10.

THIS was an application on behalf of the plaintiff, that the Taxing-officer should be at liberty to review his taxation of the defendant's costs, as far as the costs of a former trial were concerned.

The party ultimately successful is entitled to the costs of a previous abortive trial of the same action.

The action was for breach of contract. There had been two trials. On the first occasion the jury had disagreed; on the second, there was a verdict for the defendant. On the taxation of the defendant's costs, there was a difference of opinion between the Taxing-masters, as to whether the defendant was entitled to the costs of the former trial. The senior officer being of opinion that the defendant was so entitled, the costs were allowed accordingly.

*D. C. Heron*, in support of the motion.

The practice adopted by the Taxing-officer has been reversed both in England and Ireland. The Court of Queen's Bench in England, in *Bostock v. The North Staffordshire Railway Co.* (a), decided that, "where the Judge trying a cause discharges the jury, because they cannot agree upon their verdict, and a second trial is had, the party who then succeeds is not entitled to costs of the first trial." *O'Driscoll v. Macartney* (b) is a decision to the same effect.—[BALL, J. In that case there was in fact no former trial.]—The authorities on the point are collected in *Gray on Costs*.—[BALL, J. If it be the fact that the rule in all the Courts in Ireland is, that the party who eventually succeeds is entitled to the costs of a previous abortive trial, are we to alter that rule, on the authority of an English decision?]

*Kernan*, contra.

The practice in this country has always been to allow the party ultimately successful the costs of a previous abortive trial. It was

a) 18 Q. B. 777.

(b) 9 Ir. Law Rep. 570.

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so held in *Atkinson v. Carty* (a), and that case has been invariably followed. *Bostock v. North Staffordshire Railway Co.* was decided in accordance with the practice in England, which is different from the practice here.—[KEOGH, J. And in that case, Erie, J., said, "If the matter were *res integra*, I do not see why, on principle, the party ultimately succeeding should not have costs, "where the Judge discharges the jury."]

*Heron.*

*Atkinson v. Carty* was decided on the authority of *Burchall v. Bellamy* (b), which must now be considered as overruled. When *Atkinson v. Carty* was decided, the practice in England was to allow the costs of a former abortive trial.

*Cur. ad. vult.*

MONAHAN, C. J.

The only question in this case is, whether, under the Statute of Gloucester, the Taxing-officer ought, in taxing the defendant's costs, to have included the costs of the abortive trial? The case of *Atkinson v. Carty* shows that the settled practice in this country at that time (and it appears to have continued up to the present time) was to consider the costs of an abortive trial, which was not occasioned by the fault of either party, as a portion of the costs in the cause. It appears that that rule was established by the Court of Queen's Bench, after a consideration of several cases, both in Ireland and England, and the Judges of that Court thought that they were establishing a rule in conformity with the practice in both countries. However, it appears that in the year 1852, the Court of Queen's Bench in England, in the case of *Bostock v. The North Staffordshire Railway Co.* (c), had occasion to consider the very same point, and some cases were referred to, showing that the practice in England was not to allow such costs. The Court there were of opinion that the costs of the abortive trial, not having been occasioned by either party, it would be hard

(a) 2 Jebb & Sym. 32.

(b) 5 Burr. 2693.

(c) 18 Q. B. 777.

to make the unsuccessful party pay them. But Mr. Justice Erle is reported to have said:—"If the matter were *res integra*, I do "not see why, on principle, the party ultimately succeeding should "not have costs, where the Judge discharges the jury." We think that there is a great deal of good sense in that observation, and that the true principle as to costs is, that all costs *bona fide* incurred by the successful party ought to be paid by the unsuccessful party, who ought never to have defended the action. Therefore, if the matter were *res nova*, the rule in the Queen's Bench would appear to be the better rule. The Court in England is not willing to alter its practice upon this point; and we are not willing to alter ours, inasmuch as we consider it to be the better of the two. Therefore we must refuse this motion; but as it was a very proper question to bring before the Court, we will not give costs.

M. T. 1856.  
Common Pleas.

BYRNE  
v.  
ELLIOTT.

BALL, J., JACKSON, J., and KEOGH, J., concurred.

Motion refused, without costs.

#### CUSACK v. M'CABE.

Nov. 6.

THIS was a demurrer to the summons and plaint, and was identical with a demurrer in the case of *Cusack v. Sloan*, which had just been argued and allowed; and it was admitted that if the demurrer in the present case could be heard, it must be allowed; but—

*M'Mahon* raised a preliminary objection.

This demurrer was filed on the 25th of June; the demurrer books were not lodged until the 4th of July; the Side-bar rule to set down the case for argument was entered on the 19th of July.

Where a demurrer had been filed, and the paper books had not been lodged until after the expiration of the six days allowed by the 50th General Order, but the usual Side-bar rule to set down the case for argument was subse-

quently entered, the Court overruled a preliminary objection to the demurrer, on account of non-compliance with the Order, and *Held* that effect should be given to the Side-bar rule until set aside.

**M. T. 1856.** *Common Pleas.* The 50th General Order provides that "Where a demurrer shall  
**CUSACK** "have been filed, the party filing the demurrer shall, within six  
**v.** "days thereafter, make up the paper books for the Judges, and  
**M'CABE.** "deposit the same in the office of the Clerk of the Rules." And  
 in the same Order it is declared that "If the books be not made  
 "up and lodged within the specified time, as aforesaid, by the  
 "party filing the demurrer, the demurrer shall be considered as  
 "set aside, and the opposite party shall be at liberty to proceed  
 "as if no such demurrer had been filed." Here the books were  
 not lodged within six days, and therefore the demurrer must be  
 considered as set aside. He cited *Dorsett v. Aspdin (a)*.—[MONA-  
 HAN, C. J. But the Side-bar rule to set down the case for  
 argument still stands, and we must give effect to that rule, unless  
 there be a motion to set it aside.]—Can the Court now allow  
 the demurrer, when by the terms of the 50th General Order it  
 has been set aside?

MONAHAN, C. J.

The Court must give effect to the Side-bar rule while it con-  
 tinues. If the plaintiff had marked judgment on the expiration  
 of the six days, the case might be different; but as it is, for any-  
 thing we know to the contrary, the delay in lodging the paper  
 books may have taken place with the plaintiff's concurrence.

Objection overruled.—Demurrer allowed.

(a) 11 C. B. 651.

### KILLINGER v. BUTLER.

Nov. 15.

The rule for liberty to proceed in an action, after a year and a day, must, under the 178th General Order, be served on the opposite party personally. The notice of motion necessary, under the same rule, after the lapse of two years, need only be served on the attorney of the opposite party.

COATES applied, under the 178th General Order, that the plaintiff be at liberty to proceed in this action, in which no proceeding had been taken for more than two years, and final judgment had not

been marked. The 178th Order provides that, "Where, after defence filed, and before final judgment shall have been marked, no proceeding shall have been taken in any action for one year and a day, by either plaintiff or defendant, and no compromise shall be depending, neither party shall be at liberty to proceed until he shall have served on the opposite party a rule for liberty to proceed, unless cause in eight days after service; and such rule may be obtained in the office at any time within two years from the last proceedings, on an affidavit of the facts; but after the lapse of two years, the party requiring such rule shall serve notice of motion, and apply to the Court for same."

M. T. 1856.  
*Common Pleas.*

KILLINGER  
v.  
BUTLER.

MONAHAN, C. J.

We can only give you a conditional order, which you cannot make absolute until it has been served on the defendant himself. It was sufficient to serve notice of this motion on the defendant's attorney.

Conditional order granted.

### LOUGHRAN v. HILL.

Nov. 15.

DIX moved that the defence in this case be set aside, as being a sham defence, and frivolous, and not containing any answer whatever to the plaintiff's cause of action; and also that the plaintiff be at liberty to mark judgment.

This was an action by indorsee against acceptor of a bill of exchange. The summons and plaint stated, "That one William Dillon, on the 24th of May 1855, drew his bill of exchange, now over-due, directed to the defendant, and required the defendant to pay to the said William Dillon, or order, £20 sterling, two months after date; and the defendant accepted said bill, and

In an action by indorsee against acceptor of a bill of exchange, a plea that the indorsee had not given full value for the bill was set aside by the Court as being frivolous and sham, and the plaintiff allowed to mark judgment.

M. T. 1856. "the said William Dillon indorsed the same to the plaintiff. But  
*Common Pleas.* "the said defendant did not pay the said bill, although the same  
 LOUGHRAN "was duly presented to him for that purpose," &c.  
 v.

HILL.

To this the sole defence was, "That the said William Dillon  
 "did not indorse the said bill to the said plaintiff, for full value,  
 "but only for a sum of £3, and no more, which the plaintiff ad-  
 "vanced upon it; and which sum of £3 the defendant now brings  
 "into Court, here ready to be paid to the plaintiff, if he will  
 "accept of the same in full discharge of his demand; and there-  
 "fore," &c.

The plea is manifestly bad, and filed only for the purpose of  
 delay. No possible legal issue could be taken on it.

*T. K. Lowry, contra.*

*Per Curiam.*

Let the plea be set aside, with costs, and let the plaintiff be at  
 liberty to mark judgment.

Rule accordingly.

## OWENS v. ROBERTS.

*Nos. 17.*

A *bona fide* communication, made in reply to a *bona fide* inquiry coming from a person interested in the subject-matter of the inquiry, when the communication is made by a person who, from his position, is likely to possess information on the subject, will be privileged, even where no moral duty to make the communication exists.

**LABEL.**—The first paragraph of the summons and plaint alleged that the plaintiff, before the writing of the letter complained of, had been for several years employed by the grand jury of the county of Meath as baronial rate-collector, at the yearly salary of £100, and had, by the punctual and honest discharge of his duties as such, acquired a good character in the neighbourhood. That it being by law required, that the person, who should for the time being fill the post of baronial collector, should give solvent securities for the fulfilment of his duties as such, the plaintiff had theretofore been

enabled to give good security, and accordingly had held the office for several years. That one J. G. Carleton had, in consequence of his good opinion of the plaintiff's character, become one of his sureties, before the writing of the letter complained of, and had, as such, in pursuance of the provisions of the statute, executed his bond to the grand jury, conditioned for the performance of the duties of baronial collector by the plaintiff for the year ending February 1855; and that the plaintiff had duly and honestly discharged his duties as such whilst J. G. Carleton was his surety, and at all times whilst he was such collector. That he (the plaintiff) had never been, before the present cause of action arose, imprisoned for debt, or any offence known to the law; yet that the defendant, knowing the premises, but intending to injure the plaintiff in his office of baronial collector, and to induce J. G. Carleton to get from the plaintiff his collector's warrant, and to lead him to believe that the plaintiff was insolvent, and likely to be imprisoned for debt, and that he was about to embezzle the public money, and thereby to prevent him from becoming one of the plaintiff's sureties at the next appointment of a baronial collector, viz., at the Spring Assizes of the year 1855, the plaintiff being then a candidate for that office, had previously, viz., on the 19th of December 1854, falsely and maliciously written the following libellous letter to J. G. Carleton, concerning the plaintiff as such collector:—

M. T. 1856.  
*Common Pleas.*  
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 v.  
 ROBERTS.

“Navan, December 19th 1854.

“MY DEAR SIR—I hear that your friend Mr. R. O., of Kells, is “going into the strong house; the sooner you see about him the “better. You should go to him, and try and get the docket from “him, and I will get you a gentleman who will give you no trouble, “and give any security you require:”—meaning thereby that the plaintiff was about to go to gaol, being insolvent and unable to pay his just debts; and that J. G. Carleton, who was then the plaintiff's surety, would thereby incur risk, if he did not secure himself, by inducing the plaintiff to give up his warrant, and by entrusting the collection of the county cess to another person; and that he should no longer place confidence in the



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*Common Pleas.*  
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plaintiff, inasmuch as the latter was intending to defraud him as his surety; nor continue to be his security for the collection of baronial cess.

The second paragraph of the summons and plaint stated that the defendant, with the object and purpose before mentioned, had theretofore, viz., on the 22nd of December 1854, falsely and maliciously written and published the following letter, of and concerning the plaintiff as baronial collector, and had sent it to J. G. Carleton, who was then the plaintiff's surety:—

“Navan, 22nd of December 1854.

“MY DEAR SIR—I received your communication this morning. “I am happy to congratulate you on your narrow escape from “Owens, which, I can safely affirm, you had. I knew his position, “and that was my reason for urging you to look sharp. I now “ask was I right in advising you in last July not to be one of “his sureties, or was your friend in Trim right? I now ask “you, as a request, that you will not make any arrangement “with any one about the collection until I see you; perhaps “you could be here on Wednesday:”—meaning that J. G. Carleton had narrowly escaped a pecuniary loss, by not becoming the plaintiff's surety, and that his refusal to become so had been caused by the defendant's act, who had caused him to suspect the plaintiff of insolvency, and inability to meet his pecuniary engagements.

Averment—That the plaintiff had been thereby greatly injured in his character and circumstances, and that J. G. Carleton and others, who had previously been his sureties, had refused to continue as such; whereby the plaintiff had been disabled from being elected baronial collector at the Spring Assizes of 1855, and had lost the gains and emoluments of that office.

The defendant's third defence to the first paragraph of the summons and plaint was as follows:—That the plaintiff had not been personally acquainted with J. G. Carleton until the Spring Assizes of the year 1854, and had then been, at his own request, introduced to him by the defendant, who had been the intimate friend of J. G. Carleton for a long time previously; and that the plaintiff, knowing

the defendant's intimacy with J. G. Carleton, had requested the former to induce J. G. Carleton to become the plaintiff's surety, who accordingly, at the defendant's request, did, for the first time, become surety for the plaintiff, at the Spring Assizes of the year 1854. That J. G. Carleton, having thus become the plaintiff's surety, afterwards, at the Summer Assizes of the same year, consented to become his surety for the ensuing collection, but without having been requested so to do by the defendant; and that, whilst his liability as such surety continued, J. G. Carleton requested the defendant, as being the person who had introduced the plaintiff to him, and had induced him to become the surety for the plaintiff for the first time, to communicate to him, whilst his liability as such surety should continue, speedy and prompt information of any fact relative to the solvency of the plaintiff, which might come to his knowledge, and which he should think it important that he (J. G. Carleton) should know, for his safety and protection as such surety; and that accordingly the defendant having been informed, previous to the month of December 1854, and before the writing of the letter in the first paragraph of the summons and plaint mentioned, and whilst the liability of J. G. Carleton as such surety continued, by certain faithworthy persons, whose information he believed to be true, that the plaintiff had become greatly embarrassed in his circumstances, and was unable to pay his debts, and was likely to be arrested for debt, and imprisoned in gaol, in case of non-payment, did compose the letter in the first paragraph mentioned; and did publish the same, by sending the same to J. G. Carleton, for his guidance and protection, and in compliance with his request, believing the same to be true; and that it was the defendant's duty so to do, *bona fide* and without malice, and as a confidential and privileged communication.

As to the second paragraph of the summons and plaint, the defendant pleaded that, having written and published the letter of the 19th of December 1854, under the circumstances mentioned in the preceding part of the defence, and having, in reply to that letter, been informed by J. G. Carleton that the advice so given had been advantageous to him, and that he had partly adopted it,

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M. T. 1856. he then wrote and published the letter of the 22nd of December  
*Common Pleas.* 1854, in reply, *bona fide* and without malice, and as a confidential  
 OWENS and privileged communication.  
 v.

ROBERTS. Demurrer to the above defences, as not showing matter sufficient  
 to render either of the libels a privileged communication.

*O'Driscoll*, in support of the demurrer.

Although, under certain circumstances, a party may be justified upon the ground of a legal or moral duty, in making a communication which would otherwise be libellous, yet, where the occasion which authorises such communication has ceased, the privilege to make such communications also ceases: *Brooks v. Blanchard* (a). So, in the present case, the responsibility of the surety as such having determined at the Summer Assizes of 1854, and the defendant having done nothing subsequently to induce the surety to renew that responsibility, any moral duty that may have protected the defendant previously ceased and could not therefore justify such a communication as the letter of December 1854.—[MONAHAN, C. J. We must assume that this letter was written *bona fide*, else the defendant could have been met with a replication; and the question then arises, whether or not this was such a continuing duty, from Assizes to Assizes, as to authorise the defendant to make this communication? He appears to have, in the first instance, advised Mr. Carleton generally to become surety for the plaintiff.]—But the defendant negatives the fact of there being a continuing request on the part of Carleton, by averring that the latter became surety of his own accord, at the Summer Assizes of 1854.—[MONAHAN, C. J. It appears from the plea that Mr. Carleton undertook the suretyship of his own accord, for the collection subsequent to the Summer Assizes, and that, during the latter period, he requested the defendant to communicate with him as to the plaintiff's solvency.]—As to the second defence demurred to, even although the defendant may have been justified in writing the former letter of December 19th 1854, yet the same principle could not protect the letter of December

(a) 3 Tyrw. 844.

22nd, which was not written until after the former letter had been acted upon by Carleton, the defendant, if he had a moral duty to perform, having performed it by writing the former letter, and the duty having thereby determined.—[He also cited *Pattison v. Jones* (a); *Præger v. Shaw* (b); *Coxhead v. Richards* (c).]

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*J. E. Walsh* (with him *Hayes*), in support of the defence.

This case is clearly within the general principle now recognised as regulating privileged communications, which is thus stated by Parke, B., in *Twogood v. Spyring* (d):—"If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." This principle is recognised by Tindal, C. J., in *Coxhead v. Williams* (e), and also in *Bennet v. Deacon* (f), and is to be found in all the authorities: *Gardner v. Slade* (g); *Hopwood v. Thorn* (h); *Harrison v. Bushe* (i); *Taylor v. Hawkins* (k); *Bull. N. P.*, p. 8; *Bromage v. Prosser* (l); *Child v. Affleck* (m); *Danman v. Bigg* (n).—[MONAHAN, C. J. If a person interested in obtaining certain information apply to another person, who is under no obligation to give such information, the latter may nevertheless do so without being guilty of publishing a libel.]

*Macdonogh*, in reply.

In the cases of *Harrison v. Bushe*, and *Gardner v. Slade*, there was an interest in the party making the inquiry; and besides, there was in the former case a corresponding interest in the party answering the inquiry; and in the latter case an obligation on the defend-

(a) 8 B. & C. 578.

(b) 4 Ir. Com. Law Rep. 660.

(c) 2 C. B. 569.

(d) 1 Cr. M. & R. 193.

(e) 2 C. B. 597.

(f) 2 C. B. 628.

(g) 13 Q. B. 796.

(h) 8 C. B. 293.

(i) 5 ELL. & BL. 344; S. C., 25 L. J., N. S., Q. B., 25.

(k) 16 Q. B. 308.

(l) 6 Dowl. & RyL. 295.

(m) 9 B. & C. 403.

(n) 1 Camp. 269.

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ant to correct a mistake that had been made. In the present case there was no moral duty on the part of the defendant to publish the libel. Even supposing that there had been, he had performed that duty by writing the first letter, and was not authorised to continue such communications for an unlimited time. The case of master and servant is *sui generis*, and cannot be drawn into a precedent when no such relation exists.

MONAHAN, C. J., delivered the judgment of the Court.

We have heard this case very fully discussed, and are now prepared to dispose of it; and we are of opinion that the communications, which are the subject-matter of the action, were privileged, assuming that they were made *bona fide*, and without malice.

We are of opinion that if a person, having an interest in obtaining information as to the affairs of another person, makes a *bona fide* application to a third person for that purpose, and the latter, in reply to such inquiry, gives the information required, such a communication is privileged; for the fact of such an inquiry having been made, not officiously, but *bona fide*, and by a person interested, imposed upon the person of whom the inquiry is made an obligation either not to speak at all upon the subject, or, if he does so, to speak the truth; and we are of opinion, upon all the authorities, that in the case of a person making an inquiry of another, who is the acquaintance of the third person as to whom the inquiry is made, and from his position, likely to be acquainted with the affairs of the latter, and where the party making the inquiry either is, or is about to become, a creditor of such third person, that such a communication is privileged. But the case before us is even stronger than this; for here the party making the communication first induced the other to become surety for the plaintiff, and although he only requested him to become, and although the other only became, such surety for a limited time, still it was upon the strength of that introduction that he continued as surety afterwards; and even if a moral duty were necessary, in order to authorise such a communication, we should be disposed to say that such a moral duty did exist in the present case. However it is not necessary

to express our opinion upon the latter question, as we conceive that, even in the absence of any moral duty, such an interest did exist between the parties as to justify and protect this communication.

Demurrer overruled.

M. T. 1856.  
*Common Pleas.*

OWENS  
v.

ROBERTS.

KISBEY and Wife

v.

CHESTER AND HOLYHEAD RAILWAY COMPANY.

E. T. 1857.

*April 16.*

THIS was an application to make absolute a conditional order that the service already made upon the Dublin solicitor of the Company should be deemed good service. The action had been brought to recover damages for injury sustained by the plaintiff and his wife, arising out of an alleged breach of contract on the part of the defendants. On the 6th of October 1856, the plaintiffs had taken tickets from the Company for a journey from Chester to Dublin, and when they arrived at Holyhead the defendants refused to provide any mode of conveyance for them or their luggage from the Railway terminus to the steamer, which was about a mile; consequently they had to walk that distance, and when they arrived at the wharf the steamer had sailed, and they had to remain at Holyhead that night. Their luggage however had been conveyed in the steamer, and the plaintiffs themselves arrived in Dublin on the 8th of October. Upon their arrival in Dublin, the plaintiffs applied at the office of the Company at the North Wall, and demanded their luggage, but could not obtain it, and, having called the following day, they found that it had been lying there since the 7th. The inconvenience sustained in consequence of this detainer, as also the refusal of the Company to provide a conveyance from the Holyhead Railway to the steamer, constituted the cause of action. The plaintiffs had previously commenced an action in the Court of Queen's Bench, but

Substitution of service may be had upon an English Company by service of their agent residing in Ireland, provided that any portion of the cause of action has arisen in Ireland.

E. T. 1857. *Common Pleas.* had been obliged to discontinue it, as the summons and plaint did not state any cause of action arising in this country.

KISBEY

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CHESTER

AND

HOLYHEAD

RAILWAY.

*E. Hayes*, in support of the application.

It is not necessary that the *entire* cause of action should have arisen in this country, in order that service upon an agent here should be sufficient: *Betham v. Fernie* (a). A very substantial portion of the cause of action was the detainer of the luggage in Dublin; and it makes no difference that the damage suffered by the plaintiffs in consequence may have been only consequential. He also cited *Cailland v. Champion* (b); *Frew v. Stone* (c).

*Macdonogh* (with him *G. May*), contra.

This action is a mere evasion, the substantial cause of action having arisen in England; and the plaintiffs should not be allowed to attract the jurisdiction in such cases. The object clearly is to obtain a trial in Ireland.

*Betham v. Fernie* does not apply; for the breach in that case went to the entire cause of action. The same observation applies to *Frew v. Stone*.

The Court will not hold that, if the real cause of action arose in England, that question can be tried in this country, because another minute cause of complaint arose in Ireland.

*J. Norwood* was not called upon in reply.

MONAHAN, C. J.

If such a rule existed as that contended for by the defendants, it would in some cases be impossible to have an action tried anywhere; but we believe the true principle to be that laid down in the case of *Betham v. Fernie*; and that is, that if any portion of the cause of action arises in Ireland, service will be substituted on an agent in this country; it being quite immaterial whether that be the greater or the smaller part of the entire cause of action. We must therefore grant the present application.

(a) 4 Ir. Com. Law Rep. 92.

(b) 7 T. R. 209.

(c) 6 Ir. Jur. 269.

BALL, J., concurred.

E. T. 1857.  
*Common Pleas.*

JACKSON, J.\*

KISBEY

v.

It is quite unnecessary to speculate whether the portion of the cause of action arising in the country where the action is brought be large or small, in comparison with the remainder. Wherever any portion of the cause of action has arisen, the plaintiff is entitled to have service substituted on an agent there.

CHESTER  
AND  
HOLYHEAD  
RAILWAY  
COMPANY.

Order absolute.

\* KEOGH, J., was presiding at Nisi Prius.

DOUGLAS v. EWING and another.

April 17, 18.

THIS was an action of trover, for the conversion of 117 pieces of linen drills. The defendants pleaded, first, that they did not convert to their own use any goods of the plaintiff, as alleged; secondly, that the goods in question were not the plaintiff's goods at the time of the alleged conversion; thirdly, that before the time of the alleged conversion, one Robert Wilson was the agent of the plaintiff, and entrusted with the possession of the goods alleged to have been converted, within the meaning of the 5 & 6 Vic., c. 39; and that whilst the goods were in such custody, the defendants agreed with Robert Wilson to advance him £170 upon a deposit of the goods in question; that the money was advanced and the goods delivered to the defendants, who continue to retain them, the money being still unpaid.

A party advancing money upon a deposit by an agent, of the goods of his principal, will be protected, under 5 & 6 Vic. c. 39, unless he had notice that the agent was acting in the transaction, without authority or *mala fide*, as against the owner of the goods; and the question of *mala fides* is for the jury.

The issues for trial raised the following questions:—First, whether the defendant did convert the linen drills, or any part of them?

Second.—Whether the linen drills were the plaintiff's goods at the time of the alleged conversion?

Third.—Whether Robert Wilson was an agent entrusted by the



E. T. 1857. plaintiff with the possession of the linen drills, within the meaning  
*Common Pleas.* of 5 & 6 Vic. c. 39?

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Fourth.—Whether the defendants, while Robert Wilson was such agent, did *bona fide* enter into an agreement with him for an advance by them of £170, upon a deposit of the linen drills?

Fifth.—Whether they did advance the above sum to Robert Wilson on deposit of the goods?

This case was tried before the LORD CHIEF JUSTICE of the COMMON PLEAS, at the Sittings after last Michaelmas Term, and the chief matter in dispute was the *bona fides* of the transaction relative to the deposit of the goods by Wilson with the defendants. At the close of the defendants' case, his Lordship told the jury that if Douglas had delivered the goods to Wilson, in order that the latter might sell them to a third party for him, Wilson should be regarded as an agent, within the meaning of 5 & 6 Vic., c. 39, even although he had obtained the goods by false pretenses, and so as to be liable to a criminal prosecution; and that if they believed that Wilson had so obtained the goods as to render him an agent, the only remaining question was, whether the defendants had obtained the goods in such a manner as to bring themselves within the protection of 5 & 6 Vic., c. 39? That if, at the time that Ewing received the goods and made the advance, he *bona fide* believed either that the goods were Wilson's or the goods of a third person, for whom Wilson was acting as agent or factor, and that he pledged the goods for the benefit and by the authority of such third person, that in such case the defendants were protected: but that if, on the other hand, they came to the conclusion that, at the time Ewing so received the goods and made the advance, he knew and believed that the goods were not the goods of Wilson, but of a third party, and that Wilson was obtaining money upon them, not for the benefit or by the authority of such third person, but for his own purposes, without authority and contrary to his duty to such third party, that in such case the transaction would not be within the protection of the statute, and that they should find for the plaintiff. The jury then retired; but returned shortly afterwards, and asked the learned CHIEF JUSTICE whether, if Ewing made the advance to Wilson in a hurry, without

reflecting or thinking one way or other, such advance could be considered by the law *bona fide*, within the meaning of the statute 5 & 6 Vic., c. 39? To this his Lordship replied, that if the facts within the knowledge of Ewing were such that if he, as a reasonable man, had thought of the subject, he could have come to the conclusion that Wilson was pawning the goods of a third person for purposes not authorised by him, then the advance was not *bona fide*, within the meaning of the statute, and was not protected thereby. To this latter direction the defendants' Counsel excepted, and called upon the learned CHIEF JUSTICE to inform the jury that unless Ewing actually knew or believed that R. Wilson was acting improperly, he (Ewing) and the other defendant were under the protection of the statute: and his Lordship having refused to alter his charge as required, Counsel for the defendant excepted thereto. The points noted for argument were confined to that portion of the charge which was given in reply to the inquiry of the jury.

The jury found a verdict for the plaintiff. A conditional order for a new trial having been obtained—

E. T. 1857.  
*Common Pleas.*  
DOUGLAS  
v.  
EWING.

*M. Harrison*, in support of the verdict, cited the following statutes and authorities:—4 G. 4, c. 83; 6 G. 4, c. 94; 5 & 6 Vic. c. 39. *Navulshaw v. Brownrigg* (a); *Evans v. Trueman* (b); *Gill v. Cubit* (c); *Down v. Halling* (d); *Crook v. Jadis* (e); *Backhouse v. Harrison* (f); *Uther v. Rich* (g); *Bank of Bengal v. M'Leod* (h), cited in *Miller v. Race* (i); *Bird v. Bass* (k).—[MONAHAN, C. J., referred to *Raphael v. the Bank of England* (l).]

*S. Ferguson* (with whom was *Joy*) cited *Sheldon v. Cox and others* (m); *Jones v. Smith* (n); *Kennedy v. Green* (o); *May v.*

(a) 1 Sim. N. S. 573; S. C. on Appeal, 2 De Gex, M. & G. 441.

(b) 2 B. & Ad. 886; S. C. 1 M. & Rob. 10.

(c) 3 B. & Cr. 466.

(d) 4 B. & C. 330.

(e) 6 C. & P. 194; S. C., 5 B. & Ad. 909.

(f) 5 B. & Ad. 1098.

(g) 10 Ad. & Ell. 784.

(h) 7 Moore, P. C., 35.

(i) 1 Sm. L. Cas. 407.

(k) 6 M. & Gr. 143.

(l) 17 C. B. 161.

(m) Amb. 624.

(n) 1 Hare, 43.

(o) 3 Myl. & K. 717.

E. T. 1857. *Chapman* (a); *Elliott v. Turner* (b); *Carlton v. Ireland* (c); *West*  
*Common Pleas.*  
*Reid* (d); *Hatfield v. Phillips* (e); *Hazeldine v. Grove* (f); *Taylor*  
*on Evidence*, p. 46.  
 DOUGLAS  
 v.  
 EWING.

*G. Fitzgibbon* was heard in reply.

MONAHAN, C. J.

We are of opinion that, at the trial, I fell into the error of mistaking what was only evidence of *mala fides* for *mala fides* itself. My direction to the jury followed the case of *Evans v. Trueman* (g), before Lord Tenterden.

The third section of the Act 5 & 6 Vic., c. 39, in terms protects all advances made *bona fide*, and without notice that the agent making such advances had no authority to do so, or was acting *malâ fide* as against the owner.—[His Lordship read the section.] —Therefore to deprive Mr. Ewing of the benefit of this defence, it would have been necessary that he should have had notice that Wilson was not the authorised agent of the plaintiff; and the question that I should have left to the jury ought to have been, whether or not the defendant had notice of this fact? My mistake was in telling the jury that the facts amounted to *mala fides*, instead of directing them to take those facts into consideration, in arriving at the conclusion whether there was *mala fides* or not.

Upon these grounds, we must allow the exceptions, and award a *venire de novo*.

(a) 16 M. & W. 355.

(b) 13 Sim. 477.

(c) 25 L. T., Q. B., 113.

(d) 2 Hare, 149.

(e) 6 M. & W. 648.

(f) 8 Q. B. 1007.

(g) 1 M. & Rob. 10.

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## BELL v. BEATTY.

*April 18.*

THIS was an application that the defence might be set aside as embarrassing, and tendering an immaterial issue. The action was ejectment for non-payment of rent, and the defence was in the following form:—"The said M. B. appears, &c., and says that she "does not hold the dwelling-house and premises, or any part thereof, "in the summons and plaint mentioned, as tenant to the plaintiffs, "or any or either of them, in the summons and plaint mentioned, "and therefore," &c.

A defence to an ejectment for non-payment of rent, stating that the defendant did not hold the premises as tenant thereof to the plaintiff, raises an immaterial issue, and will be set aside.

*Hayes*, in support of the application.

We know that the defendant is not a tenant; and if she is allowed to sustain this defence, she will defeat the ejectment by proving that she is a caretaker. The allegation in the defence should have been, that neither the defendant, *nor any one else*, holds as tenant to the plaintiffs. The summons and plaint was of necessity in the form required by the statute, and described the defendant (who occupies part of the premises as caretaker) as tenant to the defendant. He cited *Dillon v. Mangan* (a).

*O'Moore*, in support of the defence.

The defence is sufficient. It denies a material allegation in the summons and plaint, viz., that the defendant holds the premises as tenant to the plaintiffs, under a lease, &c. : *Figgis v. Hickey* (b).

MONAHAN, C. J.

In that case the defendants pleaded that neither they, nor any of them, nor any other person, held the premises as tenant to the plaintiff; whereas, in the present case, there is no such defence; and,

(a) 8 Ir. Jur. 335.

(b) 7 Ir. Jur. 160.

**E. T. 1857.** if it should turn out that the defendant was a mere trespasser, she  
*Common Pleas.* could succeed upon this defence.

**BELL**  
**v.**

**BEATTY.** issue.

We must therefore set aside the defence, as raising an immaterial

Rule accordingly.

**T. T. 1857.**

*May 23, 25,*  
*26.*

*June 11.*

**GROOM and others v. BLAKE.**

R. B. died in 1819, seised in fee of C. East and of other lands, and also having a life interest in the lands of C. West, the reversion of which belonged to L.—R. B. by his will devised all his real estates to the widow of his brother P., for her life, with a power of appointment in fee to

THIS was an ejectment on the title, brought for the recovery of a certain denomination of land, called Clooncon West, or the Mountain Farm of Clooncon, in the barony of Ballymoe and county of Galway. The action was tried at the Galway Spring Assizes 1857, before Mr. Baron Greene, when the plaintiff made the following case; viz, that Clooncon East and Clooncon West are separate and distinct denominations, having originally been separately granted to different persons; that Clooncon East was adjudged in 1677 by the Court of Claims to Nicholas Blake, the common ancestor of the plaintiff Peter Blake and of the defendant, and had formed the only proper subject of a former action of ejectment, brought by the defendant in 1849. whichever of her two sons G. E. B. or S. B. she pleased. Upon the death of R. B., G. E. B., disputing the title of his mother, entered upon all the lands, including C. West, adversely, as regards the latter, to the title of L., and continued in undisturbed possession until 1825. From 1825 until 1841, the lands of C. West were under receivers, appointed by the Court of Chancery, at the instance of the judgment creditors of R. B. and others. The judgments against R. B. had been revived against the heir and terretenants of R. B.; and G. E. B. was served as terretenant. From 1840 until his death in 1844, G. E. B. was in the actual enjoyment of the rents and profits of C. West, and, upon his death, his son and heir-at-law P. B. succeeded him in the possession, until he was evicted thereout, as well as out of the other devised estates, in 1850, by the present defendant, claiming as the eldest son and heir-at-law of S. B., the appointee of his mother under the will of R. B. A cross-ejectment was brought in 1857 by P. B., and a mortgagee of G. E. B., who had not been a party to the former suit, upon the ground that R. B. had gained an estate in fee, by an uninterrupted possession of twenty years, within the meaning of the 3 & 4 W. 4, c. 27, ss. 2, 3 and 34. At the trial, the Judge told the jury in his charge that the possession of the lands of C. West, by receivers, appointed at the instance of the creditors of R. B., was such an interruption of the twenty years' possession as would prevent the statute from transferring to G. E. B. and his heirs an estate in fee-simple. The jury found that R. B. had only a life interest in C. West, but that G. E. B. and the plaintiff P. B. had not an uninterrupted possession for twenty years.—*Held*, that the possession of the receiver for the above purposes did not so far interfere with the possession of G. E. B., as to prevent the Statute of Limitations operating in his favour.

upon the judgment in which action the *habere* issued in 1850 was founded. That Clooncon West had been originally granted, together with other lands, to Sir George St. George, by a patent of the 20th of December 1666, from whose family it afterwards passed successively to the Earl of Ross and to Henry Lanauze. That the Blakes paid rent for it to Lanauze, until the death of Robert Blake in 1819, when Giles Eyre Blake, his nephew, took possession of it, without title, and held possession for twenty years and upwards, without paying rent, or otherwise acknowledging the title of Lanauze or of any other person, and so, by the Statute of Limitations, became owner in fee-simple. That G. E. Blake died in 1844, so seised, whereupon the plaintiff, as his eldest son and heir-at-law, entered and became owner in fee of the land so acquired by his father; and that the defendant afterwards in 1850, without title, but, taking advantage of a mistake in his own ejectment proceedings, which had been brought for Clooncon generally, wrongfully took possession, under the *habere*, of the lands in question, for the recovery of which the plaintiff now instituted the present cross-ejectment. It appeared, by the evidence given on the part of the plaintiff, that Peter Blake, the younger brother of Robert Blake, was the grandfather of both plaintiff and defendant, and died in his brother's lifetime, leaving Giles E. Blake, the father of the plaintiff, and Stephen Blake, the father of the defendant, surviving him. The Blake family had been seised of two estates in fee-simple, one called Crumlin, situate in the barony of Tyaquin, near Athenry, the other Clooncon, otherwise called Clooncon East, in the barony of Ballymoe, near Eyrecourt, sixteen miles from Crumlin, both of which descended to Patrick Blake, the great-grandfather of the plaintiff and defendant, who died in 1790, seised thereof, leaving four sons, of whom Stephen, the eldest, died in 1814, seised of the above, leaving no child, and was succeeded by his next brother, Robert, who entered, and died seised in 1819. Robert left a widow and two daughters, and by his will devised the estate of Clooncon to Jane Blake, the widow of his brother Peter, for her life, with power, by deed or will, to appoint it, on her death, to whichever of her two sons, Giles

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*Common Pleas.* could succeed upon this defence.

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E. Blake disputed his

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The present plaintiff, who had succeeded

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of Clooncon, but also of Clooncon East and West. In

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the will of his grandfather, and the subsequent deed of

The cause was tried at Galway Summer Assizes

when a special verdict was found, in which Clooncon was

consisting of ten subdenominations, but without reference

division into Clooncon East and West. Upon the argument

special verdict, upon grounds not involved in the present

judgment was given for the then plaintiff, and an *habere* was

accordingly executed.

The plaintiff Groom held under a mortgage in fee of the lands

in question, executed in 1841 by Giles E. Blake. Although served

with the ejectment in 1849, he did not take defence previous to the

trial. A good deal of evidence, both parol and documentary, was

given, on the part of the plaintiff, for the purpose of establishing the

fact of the alleged diversity of Clooncon East from Clooncon West,

and that the last mentioned lands had been successively the prop-  
 erty of the St. Georges, the Earl of Ross and Lanauze, and that  
 Robert Blake's interest therein had expired with his life. At  
 the close of the plaintiff's case, Counsel on the part of the  
 defendant called for a nonsuit, which having been refused, the  
 defendant sought to establish that the fee-simple in the lands of  
 Clooncon West had been acquired by the Blake family, and that

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 Giles E. Blake himself—proceedings by *elegit* against the  
 heir and tertenants of Robert Blake, to which G. E. Blake had  
 been a party, and orders for the appointment and extension of  
 a receiver over the lands in question, in common with the other  
 lands of the Blake family, from the year 1825 to 1840, for the  
 purpose of showing acquiescence on the part of G. E. Blake in the  
 claims of the creditors of ancestors affecting these lands, which  
 claims he would have been entitled to resist, in case Robert Blake  
 had died seised of no descendible estate in Clooncon West. The  
 learned Judge left to the jury two questions:—First, whether Robert  
 Blake was seised in fee? telling them that, if so, his will was an  
 answer to the plaintiff's claim; but if he were not, but only seised  
 for his life, then, secondly, whether Giles Eyre Blake, and the  
 plaintiff in succession to him, had been in adverse possession for  
 twenty years? that, if so, that would create a title in the plaintiff to  
 maintain the present ejectment; but that the possession, in order  
 to create such a title, must have been uninterrupted, and that the  
 documentary evidence given by the defendant was evidence to war-  
 rant them in saying that the possession had been interrupted; and  
 that, if they thought so, the plaintiff could not add the time before  
 his possession was disturbed to the time subsequent to his resumption  
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Eyre, the plaintiff's father, or Stephen, the defendant's father, she should think fit. In consequence of a mistake in the will, relating to the name of the lands, Giles E. Blake disputed his mother's title to Clooncon, and held possession of it during her lifetime, and was not disturbed by her; but she, by a deed, dated 28th of October 1819, in pursuance of the power limited to her in Robert Blake's will, appointed the lands of Clooncon, after her death, to her second son Stephen, the father of the defendant. She died in March 1848, and Stephen Blake, who survived her, died in the following October, leaving the defendant, his eldest son, him surviving. The present plaintiff, who had succeeded his father Giles Eyre Blake in 1844, was then in possession not only of Crumlin, but also of Clooncon East and West. In 1849, the defendant brought his ejectment on the title against the present plaintiff, for the lands of Clooncon, claiming title exclusively under the will of his grandfather, and the subsequent deed of appointment. The cause was tried at Galway Summer Assizes 1849, when a special verdict was found, in which Clooncon was treated as consisting of ten subdenominations, but without reference to any division into Clooncon East and West. Upon the argument of the special verdict, upon grounds not involved in the present case, judgment was given for the then plaintiff, and an *habere* was accordingly executed.

The plaintiff Groom held under a mortgage in fee of the lands in question, executed in 1841 by Giles E. Blake. Although served with the ejectment in 1849, he did not take defence previous to the trial. A good deal of evidence, both parol and documentary, was given, on the part of the plaintiff, for the purpose of establishing the fact of the alleged diversity of Clooncon East from Clooncon West, and that the last mentioned lands had been successively the property of the St. Georges, the Earl of Ross and Lanauze, and that Robert Blake's interest therein had expired with his life. At the close of the plaintiff's case, Counsel on the part of the defendant called for a nonsuit, which having been refused, the defendant sought to establish that the fee-simple in the lands of Clooncon West had been acquired by the Blake family, and that

the rent of £40, which the plaintiff had proved to have been paid by Robert Blake to Lanauze, was a charge of some sort, which ceased upon the death of R. Blake. No direct evidence was offered in support of these allegations. The chief ground of defence which he relied on was, that the plaintiff's title resting, as it did, wholly upon the Statute of Limitations (3 & 4 W. 4, c. 27), could be complete only upon the supposition that Giles Eyre Blake, and his heirs, had continued in uninterrupted possession for a continuous period of twenty years; and in disproof of that fact, he gave in evidence attested copies of Equity proceedings, at the suit of judgment creditors of Patrick Blake, Stephen Blake, Robert Blake and Giles E. Blake himself—proceedings by *elegit* against the heir and tertenants of Robert Blake, to which G. E. Blake had been a party, and orders for the appointment and extension of a receiver over the lands in question, in common with the other lands of the Blake family, from the year 1825 to 1840, for the purpose of showing acquiescence on the part of G. E. Blake in the claims of the creditors of ancestors affecting these lands, which claims he would have been entitled to resist, in case Robert Blake had died seised of no descendible estate in Clooncon West. The learned Judge left to the jury two questions:—First, whether Robert Blake was seised in fee? telling them that, if so, his will was an answer to the plaintiff's claim; but if he were not, but only seised for his life, then, secondly, whether Giles Eyre Blake, and the plaintiff in succession to him, had been in adverse possession for twenty years? that, if so, that would create a title in the plaintiff to maintain the present ejectment; but that the possession, in order to create such a title, must have been uninterrupted, and that the documentary evidence given by the defendant was evidence to warrant them in saying that the possession had been interrupted; and that, if they thought so, the plaintiff could not add the time before his possession was disturbed to the time subsequent to his resumption of possession, so as to make up twenty years. In answer to a question from one of the jury, whether the appointment of a receiver, and the receipt of the rents by him, would be a disturbance of possession, the learned Judge said, that if such receipt

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were for the purpose of paying, and that the rents were paid in discharge of, a debt due, not by Giles E. Blake himself or the present plaintiff, but by Robert, or by any other person not deriving from G. E. Blake—such application of the rents would be an interruption of the possession of Giles E. Blake.

Counsel for the plaintiff took the following objections to the charge:—First, that the facts proved by defendant did not constitute such an interruption as to defeat a title founded on the Statute of Limitations; secondly, that the evidence relied on as having that effect did not affect the lands of Clooncon West. The jury found, in answer to the questions left to them, that Robert Blake was not seised in fee of Clooncon West, and that G. E. Blake did not, in consequence of the appointment of the receiver, hold undisturbed possession for twenty years, and they accordingly returned a verdict for the defendant. In the following Easter Term, *Fitzgibbon* obtained a conditional order for a new trial, on the ground of misdirection of the learned Judge.

*Brewster* (with whom was *Charles Andrews*) showed cause against making absolute the above conditional order.

The evidence, at the trial, showed the absence of a continued uninterrupted possession, by G. E. Blake and the present plaintiff in succession to him, for a period of twenty years. It is conceded, at the other side, that G. E. Blake, through whom the plaintiff claims, had no other title to Clooncon West than whatever he might have acquired by the operation of the Statute of Limitations, 3 & 4 W. 4, c. 27, ss. 2, 3 & 34. Assuming that, in case he had held uninterrupted possession of the lands from 1819 to the time of his death in 1844, the Statute of Limitations would have run in his favour, and transferred to him a title against the world, the appointment of the receiver interrupted his possession, and so deprived him of the benefit of the statute. Therefore, admitting that *Lanauze* the reversioner was barred, as soon as the present plaintiff was turned out of possession by the present defendant, it became impossible for him to re-assert a claim to the property, for want of a prior continuous possession for twenty years: *Doe d. Goody v.*

*Carter (a)*; *Doe d. Carter v. Barnard (b)*. Adverse possession by a succession of independent trespassers, for a period exceeding twenty years, confers no right of property on any of them who has not himself had twenty years' uninterrupted possession. It merely affords a defence to a trespasser in possession against an action by the former rightful owner: *Dixon v Gayfere (c)*; *Fluker v. Gordon (d)*. The possession of the receiver was not referrible to G. E. Blake, as he was appointed on foot of a judgment revived against the heir and tertenants of Robert Blake, through whom G. E. Blake did not derive. At all events, the Statute of Limitations could not run while the receiver was in possession.

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*Fitzgibbon* and *P. Blake* (with whom was *W. J. Sidney*),  
contra.

It is conceded that G. E. Blake entered into possession in 1819, without title. Even assuming that the plaintiff, and the party through whom he claims, had not such an uninterrupted possession as would bring the case within the 34th section of the 3 & 4 W. 4, c. 27, he had such a prior possession as would give him a presumptive title as against a party who had wrongfully evicted him: *Doe d. Harding v. Cook (e)*; *Doe d. Hughes v. Dyball (f)*. The case of *Dixon v. Gayfere* is distinguishable, because the legal estate was outstanding in a trustee. The appointment of the receiver was no interruption to the running of the statute in favour of G. E. Blake: *Anonymous (g)*; *Harrison v. Duigenan (h)*; *Gresley v. Adderley (i)*; *Wrixon v. Vyse (k)*; *Thomas v. Brigstocke (l)*. The acts of the receiver did not affect the rights of the owners of the land, as his agency was to be regarded as merely for the purposes of the suit in which he had been appointed: *Lessee Hobson v. Donelan (m)*. It has been found by the jury that the interest of

(a) 9 Q. B. 863.

(b) 13 Q. B. 945.

(c) 17 Beav. 421.

(d) 17 Beav. 421.

(e) 7 Bing. 346.

(f) Car. & Marsh. 32.

(g) 2 Atk. 15.

(h) 2 Dr. & War. 295.

(i) 1 Swanst. 579.

(k) 2 Dr. & War. 192; S. C., 3 Dr. & War. 104.

(l) 4 Russ. 64.

(m) 4 Ir. Jur. 19, n.

T. T. 1857. Robert Blake expired with his life; and as it is not to be intended  
*Common Pleas.* that the Court of Chancery was a trespasser, it must be taken  
 GROOM that the receiver entered into the receipt of the rents and profits  
 v. of the lands in question with the consent of G. E. Blake. The  
 BLAKE. plaintiff is not estopped by the *scire facias*: *Trevivan v. Lawrence* (a); *Outram v. Morewood* (b).

C. Andrews replied.

*Cur. ad. vult.*

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MONAHAN, C. J., delivered the judgment of the Court.

June 11.

This was a motion to set aside a verdict had for the defendant at the last Assizes for Galway, and for a new trial. The action was one of ejectment on the title, brought to recover the possession of the lands of Clooncon West, in the county of Galway; and it was tried before Mr. Baron Greene at the Galway Spring Assizes 1857. The principal plaintiff was Peter Blake, the claimant of the inheritance; Mr. Groom, a mortgagee of his father, was also a plaintiff. The title made by the plaintiffs was, that Peter Blake, though he was defeated in 1849, in a former ejectment on the title, brought to recover these lands, and was evicted thereunder in 1850, had, at the time of the bringing of that action, a defence of which he did not avail himself; that the lessor of the plaintiff, in that ejectment, had no title; that the special verdict in that case was founded on a mistake of facts, and that the lands now sought to be recovered were his property, his father and himself having been in possession of them as owners for more than twenty years. They alleged, and gave evidence at the last trial, that the lands were originally the fee-simple estate of the Earl of Ross; that afterwards they became the estate of the Lanauze family, who were in receipt of the rents during the life of Robert Blake, and up to the time of his death in 1819; that the gale which fell due before the death of Robert Blake was paid to the Lanauzes after his death, but no rent was subsequently paid. The question having been submitted to the jury, and, in our opinion, properly so, they found that Robert

(a) Salk. 276; S. C., 2 Sm. L. C., 4th ed. 605.

(b) 3 East, 346.

Blake was not scised of these lands in fee-simple, but had only a life estate therein. To warrant that finding there was, to say the least of it, some evidence; and it is not for us now to say that the finding of the jury on that point was against the weight of evidence. We are bound to assume that Robert Blake's title determined with his own life; and that at once disposes of the question of defendant's title depending upon the construction of the will of Robert Blake. If Robert Blake had an estate which he could have devised, we should have deemed ourselves bound by the judgment of the Queen's Bench on the special verdict, to hold that defendant was entitled to the lands; but the jury having found, upon that question, that Robert Blake had no title, and consequently that the special verdict in 1849, in favour of the present defendant, was founded upon a mistake of facts, the next question then arises, whether though the present defendant had, at the time in question, no title, yet, inasmuch as he obtained the possession of the lands under legal process, the present plaintiff has such an estate in the lands as will entitle him to recover them, in an ejectment on the title against the present defendant Stephen Blake, who is now in possession? It was alleged, on the part of the present plaintiff, that in 1819, on the death of Robert Blake, who was in possession until then, Giles Eyre Blake, the father of the plaintiff, entered and continued in actual possession of the lands for some time. The precise period does not appear, but the first order for the appointment of a receiver was in 1825, and, so far as we can see, Giles E. Blake remained in possession of the lands in the interval between 1819 and 1825. In addition thereto, he was also in possession of the lands of Crumlin, to which he was entitled under the will of Robert Blake, and likewise of the denomination of Clooncon East, adjoining the lands included in the present ejectment. Thus, for six years, Giles Eyre Blake remained in actual possession of these three denominations of land, but, so far as we can see at present, without having any title to the lands of Clooncon West. Then, proceedings were taken by creditors for the appointment of receivers. Some of these parties were the creditors of ancestors of Giles E. Blake, namely, of Patrick Blake his grandfather, and of Robert Blake, and others

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were creditors of himself, a fact that is not very material. The creditors of the ancestors had no personal demand against Giles Eyre Blake, and they had no title to have their debts levied out of that particular denomination, if it were not the estate of Robert Blake, though they had a right to have their demands levied off the other denominations, which had been the estate of Robert Blake. It appears that from 1825 to 1840, a succession of receivers were from time to time in possession of these lands, but in 1840 the last of these was discharged, and Giles E. Blake re-entered into possession, and the balance of the rents, then in the receiver's hands, after payment of the creditors' demands, was, by the order of the Court, paid over to G. E. Blake. We have no distinct evidence as to the precise part of the lands into which G. E. Blake was put back into possession, but it may be inferred that he was restored to possession generally. At the close of the plaintiff's case, Mr. *Brewster*, who attended as special Counsel on behalf of the defendant, called upon the Judge to nonsuit the plaintiff, which the Judge having refused to do, the defendant went into his case, which consisted almost entirely of documents, sixty-two in number. At the close of the case on both sides, the learned Judge left two questions to the jury:—First, was Robert Blake seised in fee-simple of the lands in question? informing them that if such was the case, his will was an answer to the plaintiff's case; but if he were not seised in fee, but only for life, then, secondly, whether Giles Eyre Blake, and plaintiff in succession to him, had been in adverse possession for twenty years? and that if so, that would create a title in the plaintiff to maintain the present ejectment, but that the possession, in order to create such a title, must have been uninterrupted; that the documentary evidence given by the defendant was evidence to warrant them in saying that the possession had been interrupted, and that if they thought so, that the plaintiff could not add the time before the possession was disturbed to the time subsequent to the resumption of possession, so as to make up twenty years. I have taken the words of the learned Judge's charge from his own report: and it appears that after he had so directed the jury, and, as I collect, after they retired to consider their verdict, they returned into Court, and inquired from him whether the

appointment of a receiver, and the receipt of the rents by him, would be a disturbance of possession? To which the learned Judge replied that if such receipt was for the purpose of paying, and the rents were paid in discharge of, a debt not due by Giles Eyre Blake himself, or of the present plaintiff, but the debt of Robert Blake, or any other person not deriving from Giles Eyre Blake, such application of the rents would be an interruption of the possession of Giles Eyre Blake. To this direction the Counsel for the plaintiff objected, and submitted that the facts proved, that is, the appointment of the receivers, did not constitute such an interruption as was sufficient to defeat a title founded on the Statute of Limitations.

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The only matter for our determination is, whether the learned Judge's direction is correct in the point objected to. It has been conceded in the argument that, when the ejectment was brought in the year 1849, by the present defendant, the title of the Lanauze family was effectually barred by the Statute of Limitations; and if the Lanauzes had then brought an ejectment against the present plaintiff, who was then in possession of the lands, the case of *Doe v. Carter (a)* is a clear authority to show that the present plaintiff could then have successfully defended such an ejectment. But the question still remains, whether Giles Eyre Blake and his son, the present plaintiff, deriving under him, are to be held to have acquired a title not merely sufficient to defend their possession as against the Lanauzes, but to entitle the present plaintiff to recover the possession, as against a party who put him out of possession without legal right so to do. The learned Judge held at the trial, and, no doubt, rightly, that if the possession of Giles Eyre Blake, and his son the plaintiff, had been uninterrupted for twenty years, they would have acquired such a title; but he held that the appointment of the receiver prevented the possession of Giles Eyre Blake being continuous; and in support of that view of the case, Counsel for the defendant relied on the case of *Doe d. Carter v. Barnard (b)*. The facts of that case were shortly these:—The husband of the lessor of the plaintiff had been for eighteen years in possession, as tenant at will, without paying rent, and died; whereupon his widow, the lessor of the

(a) 9 Q. B. 863.  
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(b) 13 Q. B. 135.  
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BLAKE. plaintiff, entered into possession, her husband, the previous occupier, having left a son. The widow continued in possession some thirteen years, and, having successfully defended the ejectment in the case to which I have referred in 9 *Q. B. Rep.*, was, in some way or other not explained in the report, put out of possession by the defendant, who derived under the unsuccessful plaintiff in the former ejectment; and the Court held that she could not maintain the ejectment. It was said by the Court that, if her husband, from the eighteen years' possession, were to be presumed to have had the fee, that such fee would have descended to his son; but the Court did not decide whether, if the ejectment had been brought by such son, he could have maintained it. I rather infer, from the reasoning of the Court in that case, that if the son had brought the ejectment, it would have been said to him, "Your father was only eighteen years in possession, and therefore you, claiming under him, not having been at all in possession, you have not, between you, twenty years' possession, and therefore cannot maintain the ejectment;" and that the case would have been held not to be distinguishable from the case put in the argument by some of the Judges. If there are twenty successive trespassers, each for a year, will the Statute of Limitations be held to confer title on the person by accident last in possession, at the time the title of the rightful owner is barred? Of course, it is not for us, sitting in this Court, to attempt reviewing the decision of the Court of Queen's Bench in that case; but as the effect of that decision was that the property was *quasi derelict*, without a rightful owner, and that whoever, by any means, could smuggle himself into possession could maintain that possession against any person bringing an ejectment, we do not think the principle of that case ought to be extended, but that it should be confined to cases coming clearly within its authority. In the present case, Giles Eyre Blake being in possession of the lands in question, the Court of Chancery, at the instance of creditors whose debts affected other estates of the said Giles Eyre Blake, though not the lands in question, by interlocutory order, not purporting to decide rights or to question the right of the said Giles Eyre Blake to the lands in question, appoints a receiver, Giles Eyre Blake not opposing the applica-

tion; and when after some time a considerable sum has been received by the receivers from time to time appointed or extended, by consent of the parties, including Giles Eyre Blake, a sufficient portion of the sums so collected is applied in discharge of the demands of the creditors, and the surplus ordered to be paid to Giles Eyre Blake, and the receiver ordered to be discharged, and Giles Eyre Blake resumes the possession, remains in possession until his death, and is succeeded in such possession by the plaintiff, his eldest son and heir-at-law, who continues in possession until dispossessed by the *habere*, on the special verdict in the case in the Queen's Bench. There are not to be found in the books many cases on the effect of the appointment of a receiver; but the principle to be deduced from them, such as they are, is, that the appointment of a receiver by interlocutory order is not in any way to affect the rights of the parties. The first case on the subject is the *Anonymous case* (a); the facts of the case are not stated, but Lord Hardwicke is reported to have said that, "Though a receiver is appointed by this Court, yet that will not alter the possession of the estate in the person who shall be found entitled at the time the receiver was appointed, so as to prevent the Statute of Limitations running on during the right in dispute." That case has been followed and acted on in this way, namely, that the possession of a receiver will not affect or prevent the running of the Statute of Limitations against the rightful owner, out of possession, not being a party to the suit. In *Harrison v. Duigenan* (b), the appointment of a receiver in a minor matter was held not to prevent the operation of the Statute of Limitations in barring the claim of an annuitant to be paid the arrears of his annuity which had accrued during the time in which the receiver had been in possession. In *Gresley v. Adderley* (c), a receiver was appointed, to keep down the interest of the incumbrances affecting the estates of a minor; and a mortgagee of a term of 100 years, which expired shortly after the appointment of the receiver, having applied for payment of the charge out of the rents so received, was refused, upon the ground that when the Court in-

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*Common Pleas.*

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(a) 2 Atk. 15.

(b) 2 Dr. &amp; War. 295.

(c) 1 Swanst. 573.

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terposed to receive the rents beyond what was required for keeping down the interest on incumbrances, all the surplus rent, after payment of interest, was received for the benefit of the heir. The same principle was acted on in the case of *Thomas v. Brigstocke* (a), where a mortgagee petitioned to be paid the rents of the mortgaged premises which had been paid into Court by a receiver, in a suit to which the mortgagee was no party, he having noticed the tenants not to pay their rents; it was held that his notice to the tenants could not divest the possession of the receiver, which was the possession of those who claimed under the will of the mortgagor. So here we are of opinion that the receiver having been appointed for the temporary purpose of paying certain debts, the right of Giles Eyre Blake to the lands, subject to those debts, not being questioned, that the possession of the receiver must be considered to be the possession of Giles Eyre Blake, for whose benefit the surplus rents were collected, and to whom they were paid. We therefore are of opinion that, in answer to the question of the jury, the learned Judge should have informed them that the appointment of the receiver did not interrupt the possession of Giles Eyre Blake, so as to prevent the Statute of Limitations conferring a title upon him.

We therefore are of opinion that the verdict had for the defendant must be set aside, and a new trial had; but as the point decided by us is somewhat new, we think it right that the defendant, if so advised, should have liberty to appeal from our order; though, so far as we in this Court are concerned, we do not mean to intimate that we entertain any doubt of the propriety of the conclusion to which we have come. Allowing the defendant to appeal from our order will probably be attended with less expense and delay, than by obliging him to raise the question by exceptions on the new trial.

JACKSON, J., stated that, not having heard the entire of the argument in the case, he refrained from taking part in the judgment.

BALL and KEOGH, JJ., concurred in the judgment of the CHIEF JUSTICE.

Rule absolute for a new trial.

(a) 4 Russ. 65.

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*Esch. Cham.*

*Exchequer Chamber.*

[REGISTRY APPEALS.]

BYRNE'S CASE.

Dec. 10.

THIS was an appeal from the decision of the Assistant Barrister of Carlow.

Michael Byrne, of Duffery, was returned by the Clerk of the Peace on list No. 14, as a person entitled to vote for the county of Carlow, in respect of premises rated at the sum of £12. 5s. 0d., in the barony of Rathvilly and county of Carlow. He was objected to, and the objection being duly proved, Byrne produced the list of registered voters for the year 1856, and his name appeared thereon as a registered voter, in respect of the same qualification as on the present list. He also produced the copy of the register of voters transmitted by the Clerk of the Peace to the clerk of the union, and by him returned to the Clerk of the Peace, verified on oath as true and correct, on or before the 1st day of July in the year 1856. On that list Michael Byrne's name appeared unobjected to by the clerk of the union. Byrne declined to give further evidence, and submitted that by these two documents he had established a *prima facie* case of his right to be on the register, and that the *onus* of proving his disqualification, if existing, lay on the objector. On the authority of *Moore's case* (a), the Barrister ruled with the claimant, and required the objector to sustain his objection by evidence. This he declined to do, and the Barrister retained the name of Michael Byrne on the list of voters for the barony of Rathvilly. The question of law submitted was, whether, under the circumstances stated, the *onus* of proving disqualification lay with the objector; or whether the objector,

A claimant to register was returned on the list of the Clerk of the Peace as a person entitled to vote for the county of C., in respect of premises rated at £12. 5s. 0d.; he was objected to, and he then produced the list of registered voters for the year, wherein his name appeared as a voter in respect of the same qualification as on the previous list; he also produced the copy of the register of voters transmitted by the Clerk of the Peace to the clerk of the union, and by him returned to the Clerk of the Peace, upon which his name appeared unobjected to.—

*Held*, that these documents, taken together, established a *prima facie* case in favour of the claimant; and not being displaced, he was entitled to be on the register.

(a) 7 Ir. Jur. 59.

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having proved his objection, it lay on Michael Byrne to give further evidence of his right to be on the register, than the two documents above mentioned ?

Several appeals depending on the same point, they were consolidated.

*J. C. Lowry* and *Napier* appeared against the claimant.

The 13 & 14 *Vic.*, c. 69, s. 55, requires that the claimant shall occupy premises within the county ; that he shall be rated for the relief of the poor to the amount of £12 annually ; that he shall have occupied for twelve months previous to the 20th of July in the current year, and that he shall have paid all taxes. It therefore lies on the claimant to give evidence of his qualification. The Clerk of the Peace, under the 15th section of the 13 & 14 *Vic.*, prepares the list of registered voters ; and under the 19th section the clerk of the union enters on that copy of the register objections to those who have not paid their rates, and returns the list to the Clerk of the Peace. Under the 55th section, that document is only evidence that the claimant is a rated occupier, and has paid his rates ; but it is no evidence that he occupied as tenant or owner. Then the additional evidence was but a duplicate of that document ; and if the document itself be not evidence, how can the duplicate of it be evidence ? The register for the current year is not evidence. Neither of these documents is *prima facie* evidence in the case of rated occupiers : *Sheane's case* (a). *Humphrys' case* (b) overrules *Moore's case* (c).

*H. Smythe* and *P. Keogh*, in support of the claim.

It is necessary, when reading that 55th section, to remember there is a property qualification, and for that qualification no payment of rates is necessary, but that payment is essential for a rated occupier. If, by the return of the clerk of the union, it appear the claimant had been a rated occupier for twelve months and has paid rates, it is

(a) 5 Ir. Com. Law Rep. 51.

(b) 6 Ir. Jur. 73.

(c) 7 Ir. Jur. 59.

sufficient *prima facie* evidence of his being entitled to be placed on the list. The production of that register is sufficient, and it was so decided in *Moore's case*. The two parts of the 55th section must be read together; the exception in the section is to prevent the old register alone being, as to a rated occupier, *prima facie* evidence.—[BALL, J. You call on us to expunge the second proviso of that 55th section; I do not think the report of the judgment in *Moore's case* quite accurate.]—*Sheane's case* differs from the present, for there only one of the two documents here was relied on. His being on the register for the previous year is *prima facie* evidence of his being entitled to register.—[BALL, J. *Sheane's case* is distinguishable, because the second document, namely, the parliamentary register, was not produced; it is not an authority against you.—MOORE J. The Legislature, by the 55th section, were dealing with the old registry as well as with the lists of the clerk of the union; and that section provides that every person registered under the old Act shall be *prima facie* entitled to be on the list, but it would not prove a *prima facie* case of occupation; then the second part of the section provides that the list returned by the clerk of the union shall be *prima facie* evidence of occupation.—KEOGH, J. The list returned by the clerk of the union is *prima facie* evidence of the person being there, and the return is *prima facie* evidence of his title to be on the register.]—The list is not a duplicate list.—[BALL, J. Is it not a duplicate of the register of the previous year?—It is of a different date, and that is important on the subject of payment of rates.—[GREENE, B. The appearance of the name on the list as an elector is *prima facie* evidence of his right, but that provision does not extend to a person claiming as occupier, unless he produce the other document.]—Precisely; the claimant for a county qualification can produce no other list than the register of voters.—[MOORE, J. The second proviso in the 55th section is a re-enactment of what is in the earlier part of the section; the old register is evidence of everything except of his being a rated occupier of sufficient value; then the return is evidence that he was the occupier; but is the link of continued occupation broken?]

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*Napier* replied.

The effect of *Moore's case* would be to strike out of the section the words "tenant or owner." No doubt, in the case of a rated occupier, these documents are evidence as to everything except the character of the occupation, whether as tenant or owner. Now by the interpretation clause of the 1 & 2 *Vic.*, c. 56 (Poor-law Act), "occupier" includes every person in the immediate use or enjoyment of any hereditaments rateable under the Act, whether corporeal or incorporeal, and the Poor-law valuers rate every occupier; but this Registration Act does not say every rated occupier shall have the franchise. The Poor-law clerk cannot say who is a tenant or owner, and hence the necessity of documents to prove it. There is no evidence here to prove Byrne is tenant or owner; the documents are satisfactory enough to prove the rating and payment of the rates; but they do not furnish the character of the occupation, and unless the Barrister is satisfied the claimant is occupier, and has paid his rates as tenant or owner, he is to expunge the name. It is an occupation franchise that is necessary, not an occupation such as a man may possess as ancillary to his duties as clerk in a bank. In *Moore's case* it was admitted the Poor-law document was not enough; does then the second document eke out the claimant's case, and establish his right as tenant or owner?—[BALL, J. *Sheane's case* decides that the return of the clerk of the union was not *prima facie* evidence of the character of the occupation; but the parliamentary register was not in evidence in *Sheane's case*; does it therefore afford *prima facie* evidence of the character of the occupation of the previous year? If so, would it not be assumed that that character of occupation still continues?—That register might be evidence, independent of the proviso in the 55th section.—[KEOGH, J. Suppose the section out of the way, would not the occupation and payment of rates be some evidence of the claimant being either tenant or owner?—MOORE, J. If you wished to prove him owner, could you not do so by showing his occupation, without producing all his title-deeds?—The statute confers a right by certain evidence; the lists only furnish evidence as to a rated occupier, and

other things must be proved *aliunde*, and therefore we submit the decision of the Barrister should be reversed.

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BALL, J., delivered judgment.

We are all of opinion that the ruling of the Barrister was right, and we hold this on the authority of *Moore's case*. *Sheane's case* is not affected by this decision. In *Moore's case*, the facts were similar to the present, and though it is somewhat difficult to reconcile a portion of the judgment as reported, yet we think the decision sound. If in the present case we were not to hold that a *prima facie* case was established, there could be no such thing as a *prima facie* case made out for a rated occupier to be registered. The Legislature in some way or other left the claimant to make out a *prima facie* case, and the only mode of so doing was by the return of the clerk of the union, and the list of registered voters; the first affords *prima facie* evidence that the claimant has been rated at £12, and had been in occupation of the premises for twelve months previously; and the second affords evidence that the claimant had been previously registered; and it so appearing, the presumption of law applies, that the requisites which were necessary to place him on the previous register still continue to exist; a state of things once existing must be presumed to continue until the reverse be shown; and it lay upon the objector to prove that Byrne was disqualified. In *Sheane's case*, the parliamentary register was not given in evidence, and there were no means there furnished of ascertaining the character of occupation of the claimant.

JACKSON, J.

The claimant must show he was a rated occupier; and this he does by the list of the union clerk: but in addition, he must prove he was tenant or owner; and this he does by the production of the register of the year; and that previous state of things being thus shown to exist, the presumption is, it continued.

GREENE, B.

The difficulty I felt was created by the 55th section; but the  
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**M. T. 1856.** meaning of it is that, except as to rated occupiers, the register shall  
*Esch. Cham.* be evidence; as to them another proof is necessary, and that is  
 furnished by the clerk of the union's list, showing the claimant has  
 paid his rates. Neither document alone is sufficient, but the two  
 taken together make out the title of the claimant.

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CASE.**

**MOORE and KEOGH, JJ., concurred.**

Decision affirmed—no costs.

#### MORPHY'S CASE.

*Dec. 10.*

A claimant to be inserted upon the list of voters for the borough of Tralee, as occupier of two houses in succession, had been rated for the last rate made in the borough on the 4th of March 1856, for one of the houses, but not for the other; another person had been rated for the other house.—*Held*, that it was not necessary that the claimant should have been rated for both houses, and no rate having been struck in the interval of succession, he was entitled to be registered, as being in successive occupation of qualified premises.

THIS was an appeal from the decision of the Revising Barrister of the borough of Tralee.

Edward Morphy claimed to have his name inserted upon the list of voters for the borough of Tralee, as a rated occupier of lands and tenements rated at £8 and upwards. Within the period prescribed by 13 & 14 *Vic.*, c. 69, he served a notice of claim, whereby he claimed to be inserted upon said list as the occupier of two houses in succession, one being the house, offices and yard, No. 12, and the other being the house and yard No. 28, in Denny-street in said borough. Claimant had been rated for the last rate made in the borough, on the 4th of March 1856, for one of said houses, but not for the other. A notice of objection having been served upon him, and the service of same proved, the Barrister called upon the claimant to establish his right to be placed on the list. The claimant contended it was not necessary for him to be rated for both houses; that he had been rated for one, and paid all rates for the house originally occupied by him; that a person named M'Carthy had been rated for the house occupied by the claimant in succession; that the claimant became tenant to said house from

the 25th of March last, but did not occupy it until the 1st of May; that no rate had been struck in the borough since the 4th of March last, and that he, the claimant, having paid all rates payable by him, was entitled to be placed on the list. M. T. 1856.  
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It was contended by the objector that the claimant should have been rated for both houses; and that although the law did not require that he should be rated for both houses for a period during which he might have occupied both concurrently, yet that it was absolutely necessary that he should be rated for both, in order to confer upon him an inchoate right to exercise the elective franchise; and that when he found his name was not upon the books as a rated occupier of the house occupied by him in succession, he should, under the 110th section of 13 & 14 Vic., c. 69, have applied to the guardians of the union to be rated; and that although the said Francis M'Carthy might have been rated for the said house, that it was not inconsistent with the intention of the Act that the names of two different parties should appear on the rate at the same time, and that it did not matter that no rate had been made during the time of claimant's occupation. The Barrister was of this latter opinion; and the claimant not having been rated for the house held in succession, and not having complied with the requirements of the 110th section, he expunged his name from the list. Several objections depended on the same point, and the appeals were consolidated.

*J. C. Lowry, Lane and Napier*, for the appellant, referred to sections 5, 7 & 110 of 13 & 14 Vic., c. 69, and cited *Reilly's case* (a)—[KROGH, J. The words of the 7th section are precise and plain:—"That the premises, in respect of the occupation of "which any person shall be entitled to be registered in any year, "&c., shall not be required to be the same premises, but may be "different premises occupied in immediate succession by such person," such person having paid all the poor-rates "which shall "have become payable from him in respect of all such premises

(a) 2 Ir. Com. Law Rep. 560.

M. T. 1856. "so occupied by him in succession."—JACKSON, J. To yield to the  
*Esch. Cham.* objection would be to repeal that section.]  
 MORPHY'S  
 CASE.

*Neligan and Sir C. O'Loughlen, contra.*

*Reilly's case* is distinguishable from this, because it involved the question whether a man seeking to register for two sets of premises should include both in his notice of claim, and whether the claim there made was sufficient in point of time. The claim here is grounded on this; should the claimant have had his name inserted on the rate for the time being, and for the premises out of which he seeks to be registered? There is nothing in that 7th section to do away with the requirements of the 5th section, and the wording of the 110th section is peculiar.

BALL, J.

The 5th and 7th sections are to be read together. We must reverse this decision of the Barrister, but we give no costs.

#### REARDON'S CASE.

Dec. 10.

Four brothers were rated in respect of premises in the borough of Tralee, at the annual value of £55. Under their father's will, the premises were devised to one of the brothers, not the claimant, subject to charges for the other three. After his death, the four brothers continued business under the old style of their father's firm, and all, except one, occupied the premises, and were supported out of the profits of the firm. There were no articles of partnership, nor did it appear that the claimant was entitled to a share in the profits.—*Held*, that the claimant did not jointly occupy in the character of tenant or owner, and was not entitled to be registered as a joint occupier of the premises.

THIS was an appeal from the decision of the Revising Barrister of the borough of Tralee.

Edward Reardon claimed to have his name inserted in the list of voters for the borough of Tralee, as a joint-rated occupier of a house, store and yard in such borough. The premises were rated at the net annual value of £55, and the claimant, with

his brothers Daniel, John and Joseph, was rated for the same. The four brothers carried on trade under the firm of Nicholas Reardon & Sons, and their bank account was kept in the name of Daniel Reardon & Co. Daniel was the eldest brother. Their father made a will, devising the house, store and yard, which were held under a lease for lives renewable for ever, to Daniel, subject to charges for the three other brothers. The four brothers continued the business since their father's death, under the title of Nicholas Reardon & Sons; they all occupied and resided on the premises, and were supported out of the profits of the establishment ever since, with the exception of Joseph. No deed of partnership was executed fixing the profits or losses to which each was entitled or liable. All bills of exchange were accepted in the name of the firm, and the four brothers assisted in the business. The lease of the premises was legally vested in Daniel, and the claimant and his two younger brothers were not, by any deed, legally entitled to a participation in the profits; but the names of the four brothers were embarked in the concern, and if the value of the premises and concern were lessened, the claimant and the younger brothers would have to bear the loss proportionately. Two years ago an arrangement was made between Daniel and his two brothers, Edward and John, that the profits and losses should be equally shared between them; that agreement was only for one year. The claimant would not state he was entitled to a share of the profits.

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It was objected that the claimant was neither tenant or owner, within the meaning of the 13 & 14 Vic., c. 69; but the Barrister held that, as to electoral rights, a strict legal title was not necessary—the question being, not whether the claimant had a right to occupy, as owner, but whether he did actually occupy, in the character of owner? and he placed his name on the list.

*J. C. Lowry*, against the claim.

Daniel was the legal owner of the premises. Edward, the claimant, had only a charge under the will on the premises, and occupied them in respect of those charges; but that is not occu-

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pying jointly as tenant or owner. The occupation was in fact because the charges were not paid off. There were no articles of partnership, and, when the term ended, the premises reverted to the owner.

*Sir C. O'Loghlen and Neligan, contra.*

This is a question of fact submitted to the Court, not of law, and ought not to be entertained.

BALL, J. The case states the brothers are not co-partners; then by whom is the business carried on?

KEOGH, J. Certainly not by the claimant.

MOORE, J. He is not in possession of the premises as partner.

*Per Curiam.*

This name must be struck off the list.

#### OLPHERTS' CASE.

Dec. 10.

A notice of objection to the name of a claimant followed the form given in schedule B, No. 15, to 13 & 14 Vic., c. 69, describing the objector to be "on the list of voters for the borough of Sligo." *Held*, sufficient, although the register of voters in the borough of Sligo is made up from three separate lists of names.

THIS was an appeal from the decision of the Assistant Barrister of Sligo. At the revision of the list of persons entitled to vote in the election of a Member for the borough of Sligo, an objection was made to the name of Francis Olpherts being retained on the list No. 11, of persons so entitled to vote. Olpherts claimed to have his name inserted on the list, in respect of being rated in the last rate as the occupier of a house and premises rated at the net annual value of £8, within the borough; and the name was in the list No. 11, published by the Town-clerk on 11th of August 1856.

The notice of objection was in this form:—

"No. 15—Notice of objection.—To Mr. Francis Olpherts, Mount-shannon, Sligo.

"I hereby give you notice that I object to your name being

"retained on the list No. 11, of persons entitled to vote in the  
"election of a Member for the borough of Sligo.

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"Dated this 15th day of August 1856.

"MICHAEL GETHIN, Oldmarket-street, Sligo,

"On the list of voters for the borough of Sligo."

The name of Michael Gethin and his place of abode, subscribed to the notice, were in his handwriting, and a written notice, to the like effect, and similarly signed and subscribed, was duly served on the Town-clerk by Gethin. The register of voters for the borough of Sligo is made up from three separate lists of names—one list of occupiers of lands, tenements and hereditaments situate within the borough, rated at the net annual value of £8 and upwards; one list of persons on the freeman's roll for said borough; and one other list of persons claiming to have their names inserted in the list of persons entitled to vote in the election of a Member for said borough in respect of the occupation of lands, tenements and hereditaments, situate within the borough, rated at the net annual value of £8 or upwards, within said borough; which lists are made out according to the forms in the schedule B to 13 & 14 Vic., c. 69, and therein respectively numbered 7, 9 and 11, and which lists are made out and published every year, by the Town-clerk of the borough, pursuant to the statute; and the register for each year is composed of the names of the voters which, on revision, are retained or inserted in the said lists Nos. 7 and 9, in each year. Upon the list No. 7, and upon the existing register of the borough, the name of the objector, with his place of abode, appeared. It was contended that the notices of objection were insufficient, and that they ought to have specified upon which of the said lists of voters the objector's name was entered. The Barrister overruled this preliminary objection, and required it to be proved that Francis Olpherts was entitled to have his name inserted in the said list of voters, No. 7; and that not being done, he refused to insert the name on said list, and expunged it from the list of claimants, No. 11.

The question for the opinion of this Court was, whether the above notices of objection, served by the said Michael Gethin, were

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or were not sufficient in law to call upon the said Francis Olpherts to prove his title to have his name inserted in the said list of occupiers?

Several other names were refused insertion in the list No. 7, on the same ground, and were expunged from list No. 11; and accordingly a consolidated appeal was lodged.

*Hemphill and J. C. Lowry*, for the appellant.

The notice of objection is bad, because it should have specified whether the objector's name was on the list 7 or 11, in order that the person objected to may know if he be qualified to object: 13 & 14 *Vic.*, c. 69, ss. 33 and 36. That latter section introduces new machinery; it directs that the objector shall give a notice of objection, according to the form No. 14 in schedule B to the Act annexed, to the Town-clerk; and shall also give a notice to the person objected to, according to the form No. 15 in the said schedule. Although there may be but two lists in the borough, the Act of Parliament contemplates the possibility of three lists, and there can be no such thing as the list of voters, until these three lists are revised by the Barrister.—[KROGH, J. The form of the notice of objection is the same as given by the schedule.]—The foot note to the schedule intimates that the objector should specify the objection on which he rests, and the list.—[MOORE, J. Can anything be plainer than the words of the statute, which says the notice may be "according to the form No. 14 in the said schedule B, or to the like effect?" Here the objector has followed the form literally.—JACKSON, J. The point is not arguable; you call on us to repeal the Act of Parliament.]—The analogous English Act, 6 *Vic.*, c. 18, s. 17, prescribes a somewhat similar form, and yet, a notice pursuing it was held bad: *Tudhall v. Town-clerk of Bristol* (a).—[GREENE, B. In that case, it was altogether a false description was given; he was said to be of the parish of Clifton, whereas it was on the list for the city of Bristol his name appeared.—KROGH, J. He was described as of a parish, whereas he should have been described as a freeman.—MOORE, J. There was no misdescription

here.]—There was no description here at all; he might have been on any list. In *Eidsforth v. Farrer* (a), Wilde, C. J., says:—"It is not enough to say that the notice is so framed that the required information may, with more or less difficulty, be obtained elsewhere:" *Tudhall v. The Town-clerk of Bristol* (b).

M. T. 1856.  
*Exch. Cham.*  
 OLPHERTS'  
 CASE.

*David Lynch* and *Gore Jones*, contra, were not called on.

BALL, J.

We are of opinion that the decision of the Barrister was right, and must be affirmed, with costs.

(a) 4 C. B. 9.

(b) 5 M. & G. 5.

#### FITZGERALD'S CASE.

Dec. 10.

THIS was an appeal from the decision of the Assistant Barrister of the county of Waterford.

The Clerk of the Peace of the county of Waterford objected to the name of Robert Stephen Fitzgerald, whose name appeared as a claimant in respect of property situated within the barony of Decies-within-Drum. On reading the notice, the Barrister rejected the claim, and struck out the name, on the ground that the notice was insufficient, and that the Clerk of the Peace could not, from such notice, ascertain the nature or character of the freehold mentioned in the notice; holding that under the head "nature and amount of qualification" (where the claimant does not state himself to be seised in fee), he is bound to set out distinctly and particularly the nature of the title he has to the property. The Barrister ruled therefore that the notice was insufficient and bad, and struck out the name of Robert Stephen Fitzgerald from the list of claimants.

A claimant served notice to register as a £50 freeholder, without further specification of his title or estate.—*Held*, that the description was sufficient.



M. T. 1856.  
*Exch. Cham.*  
**FITZGER-**  
**ALD'S**  
**CASE.**

The notice of claim was as follows :—

"Barony of Decies-within-Drum.—To the Clerk of the Peace of the county of Waterford.

"I hereby give you notice that I claim to have my name inserted  
 "in the list for this barony, of voters for the county of Waterford,  
 "and that the particulars of my place of abode and qualification are  
 "stated in the columns below.

"Dated the 31st day of July 1856.

(Signed) "ROBERT STEPHEN FITZGERALD."

Christian-name and Surname of the Claimant, at full length.	Place of Abode.	Nature and amount of qualification.	Townland or Denomination.
Robert Stephen Fitzgerald ...	Youghal	£50 Freehold	Coolnacally.

*Clements* and *Horace Fitzgerald* appeared for the claimant.

They referred to *Hitchins v. Brown (a)*; 13 & 14 *Vic.*, c. 69, s. 27, schedule A, 9.

No Counsel appeared against the claim.

*Per Curiam.*

The claimant's description is quite sufficient; his name therefore must be put on the register.

(a) 1 *Lut.* 323.

#### FITZPATRICK'S CASE.

*Dec.* 10.

A notice of objection which describes the objector as "of Williams'-place, being now on the register of voters for the county of D.," is sufficient.

THIS was an appeal from the decision of the Assistant Barrister for the county of Dublin.

A person named Henry Smith, whose name was on the list of voters of the county of Dublin, objected to the name of James

Fitzpatrick being retained on the list of voters. The notice of objection was in the following form:—

*M. T. 1856.*  
*Exch. Cham.*

“Barony of Upper-cross.—To James Fitzpatrick, of Old Mount-pleasant.

**FITZ-  
PATRICK'S  
CASE.**

“Take notice that I object to your name being retained on the  
“list of the barony of voters for the county of Dublin.

“Dated this 13th day of August 1856.

(Signed) “HENRY SMITH, of Williams'-place,

“Being now on the register of voters for the county of Dublin.”

The notice was duly served on James Fitzpatrick. The entry of the name of Henry Smith on the register was as below:—

No. prefixed to each name on the Register.	Christian-name and Surname of each person on the Register, at full length.	Place of Abode.	Nature of Qualification.	Townland or Denomination, Street, Lane, &c.
1320	Henry Smith ...	Williams'-place	£50 Freehold	Great Newtown.

James Fitzpatrick was then requested by the Barrister to prove he was entitled on the 20th of July last to have his name inserted on the list of voters; but he declined doing so, alleging that the notice of objection was insufficient to apprise him of the place of abode of the objector, and bad in law. It was proved that there were three places, at least, of the name of Williams'-place in the same county, viz., one in the barony of Coolock, containing twenty houses, another near New-street, in the barony of Upper-cross, containing thirty houses, another near Glasthule, in the barony of Rathdown. The objector resided at Williams'-place near New-street. The Barrister was of opinion, and decided, that the description in the notice of objection of the place of abode of the objector was insufficient in law, and retained the name of James Fitzpatrick on the register. If the Court should be of opinion that the description of the place of abode of the appellant in the notice of objection is sufficient in law, the name of James Fitzpatrick was to be expunged from the register.

M. T. 1856.  
*Esch. Cham.*

FITZ-  
PATRICK'S  
CASE.

*Exham and Napier*, for the appellant.

The proper description of the objector is as he appears on the list of voters: 13 & 14 *Vic.*, c. 69, schedule A, form 12.—[BALL, J. Following the description in the schedule is sufficient; we will hear the other side.]

*Hamill and T. O'Hagan*, contra.

The mere addition of Williams'-place to an objector's name cannot be held sufficient. Williams'-place may be in Dublin or Cork.—[BALL, J. The form used is the same as given in schedule A, No. 12; and you say that is not sufficient.]—The residence of the objector should be stated with specific certainty; that schedule requires certainty of situation as well as of identity: *Gadsby v. Warburton (a)*.—[JACKSON, J. Does not the objector refer you to the register of voters, where you can get further information if you require it?—The register cannot be called in aid to eke out an insufficient notice: *Woollett v. Davis (b)*.—[BALL, J. Here the objector describes himself as of the list of voters.—MOORE, J. Williams'-place is described as in the barony of Upper-cross.—BALL, J. One Judge might hold that description of the barony sufficient, another Judge might take a different view; but it is a matter of fact for the Barrister to decide and say whether or not the description is sufficient. Your objection to the notice is that it is insufficient in point of law.]—If the place of abode be stated in a reasonable way, and sufficient for the purposes required, it is enough; but the objector is not to describe himself as he pleases. True, that literally the Act of Parliament is complied with; but is that description "Williams'-place" enough?—[BALL, J. If the claimant could have shown he was misled by insufficiency of description, it would be an answer to the objection; you must show you were misled.—JACKSON, J. The notice complies with the Act of Parliament.—MOORE, J. It specifies the place of abode; the Barrister must, from the notice and the other facts, draw his own conclusion, and he has decided on the abstract question that, in point of law, the notice was insufficient.]

(a) 1 Lut. 136; S. C., 7 M. & G. 11. (b) 1 Lut. 607; S. C., 4 C. B. 115

BALL, J.

We are all agreed that whatever might have been the result of the Barrister deciding on the question of fact, he has not done so, but has decided, as a point of law, that this notice pursuing the Act of Parliament is insufficient. If that form of notice have been strictly complied with, we cannot hold that the objector has not done what the Act requires. We decide the case simply as a question of law referred to us; we say nothing as to the sufficiency of the facts on which the Barrister rested his judgment. We must reverse the decision.

M. T. 1856.

*Exch. Cham.*

FITZ-  
PATRICK'S  
CASE.

#### LUCAS' CASE.

Dec. 11.

THIS was an appeal from the decision of one of the Revising Barristers for the city of Dublin.

The name of Leonard Lucas appeared on the list of persons claiming to have their names inserted in the list of persons entitled to be on the freeman's roll, entitled to vote in the election of Members for the city of Dublin. An objection was duly made to the name being retained on the said list; and the objector having appeared in support of the objection, the Barrister required it to be proved that Leonard Lucas was, on the 20th of July 1856, entitled to have his name inserted on the said list of voters. It was proved by an entry in the freeman's roll of the city of Dublin, that Leonard Lucas was, on the 5th of September 1855, admitted to his freedom, and that he had resided in the said city for six months previous to the 20th of July.

A, being bound apprentice by indenture to a freeman for seven years, during the term, by consent of the master, went into the employment of a person not a freeman, and continued there until the expiration of his apprenticeship. There was no transfer of the indentures.—*Held*, that the claimant was not entitled to be on the list of freemen.

On cross-examination, the claimant stated he was bound apprentice to Mr. Mahood, apothecary, a freeman of the city, in 1847, under indentures of apprenticeship for seven years, which indentures were produced, and upon which was indorsed a certificate in

M. T. 1856. the handwriting of Mr. Mahood, in the words and figures following:—

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 {  
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 CASE.

"I certify that Mr. Leonard Lucas served me as an apprentice,  
 "from the 17th of September 1847, to the full end and term of  
 "seven years.

"ADAM MAHOOD,

"14 Bridge-street."

There was no stamp on the indentures, but no objection to the admission was on that account raised before the Barrister. Leonard Lucas, on his cross-examination, admitted he had not remained the full term of seven years' apprenticeship with the said Adam Mahood; but that he having attained his age of twenty-one years, at the request of Mr. Mahood he passed one year of his term with an apothecary at Kingstown, a freeman of said city, and had, with his own accord, with the knowledge of said Adam Mahood, passed another year of said term with Dr. Daly, an apothecary, of Henry-street. It did not appear Dr. Daly was a freeman. There was no assignment of the indentures to either of these persons. He obtained his diploma as an apothecary from the Apothecaries' Hall in Dublin, in 1850. The Barrister was of opinion that, under the circumstances, Leonard Lucas was rightly admitted to his freedom, and was entitled, on the 20th of July, to have his name inserted on the list of voters, and retained his name on the list. If the Court should be of opinion that Leonard Lucas was improperly admitted to his freedom for the said city, his name was to be expunged from the said list.

*C. R. Barry* and *T. O'Hagan*, for the appellant.

It was proved here that a portion of the servitude was to a person not a freeman. *The King v. Inman* (a). There an apprentice, bound for seven years to A, served him in his house between five and six years, and afterwards for the remainder of the term resided in his mother's house, having agreed with his master that he should be at liberty to work for whom he pleased, he paying two shillings per week to his master. The master also, during this term, occasionally gave him work, for which he was not paid; and

(a) 4 B. & Ald. 55.

it was held that this was not a continuance of the service to A for seven years under the indenture.—[BALL, J. There he had the consent of his master to go to his mother's and do business for others.—GREENE, B. That case was a *quo warranto* against the defendant for exercising the franchise; here, the claimant was actually admitted.]—2 & 3 W. 4, c. 88, s. 9; *Smith's case* (a.)

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*Exch. Cham.*  
 LUCAS'  
 CASE.

*W. W. Brereton* and *Hyndman*, contra.

*Smith's case* is no authority: it was decided by a committee of the House of Commons: and as to *The King v. Inman*, it is enough to say that the facts here are quite different.—[BALL, J. It is not an apprenticeship except to a freeman, and it is not proved that the claimant served the full period of seven years.]—It is not necessary, in order to serve a master, that the service should be rendered in the master's house. The master is not prevented allowing him to go elsewhere to learn his trade.—[MOORE, J. Has he a right to transfer his apprentice to a man not a freeman?]*—Rex v. Inhabitants of Sandhurst* (b).—[BALL, J. The question here is not whether a person can gain a settlement, but can he acquire the franchise of a freeman by serving another person, not a freeman?]*—In The King v. Inhabitants of Banbury* (c), Denman, C. J., says, p. 181:—"But the authorities show that where a party has been bound apprentice in one parish, and expressly permitted by his first master to work for another in a different parish, the service to the second master is constructively a service under the indenture, and that the original binding continues in force during the whole period of such service."—[KEOGH, J. But the facts proved here render that case inapplicable.—MOORE, J. A freeman by taking an apprentice, and that apprentice serving him, confers the franchise; but if your argument be good, a person serving a freeman for a single day might afterwards go elsewhere and complete his servitude; this would lead to a swamping of the constituency.]

*Per Curiam.*

The name of Leonard Lucas must be expunged from the list.

(a) Bar. & Aust. 370.

(b) 6 Ad. & El. 130.

(c) 5 B. & Ad. 176.

## ORPEN'S CASE.

Dec. 11.

The son of an honorary freeman, who was created such since the 30th of March 1831, born after his father's admission as such, and duly admitted in respect of birth, is entitled to be placed on the list of freemen, inasmuch as he is an ordinary freeman, and therefore, under the 13 & 14 Vic. c. 9, entitled to vote.

THIS was an appeal from the decision of one of the Revising Barristers of the city of Dublin.

The case stated that at the revision held in Dublin, on the 20th of September 1856, the name of Charles D. W. Orpen appeared on list No. 9, of persons claiming to have their names inserted in the list of persons on the freeman's roll, entitled to vote in the election of Members for said city. An objection was duly made to his name being retained on the list. The said Charles D. W. Orpen is the son of Richard J. T. Orpen, who was admitted an honorary freeman since the 30th of March 1831. Charles D. W. Orpen was born after the admission of Richard J. T. Orpen as an honorary freeman, and attained his age of twenty-one years sometime since. He was duly admitted to the freedom of the city, by reason of birth, in the year 1856, and his name now appears on the freeman's roll. He resides in the city of Dublin. The Barrister was of opinion, upon the construction of the 9th section of the Reform Act, that Charles D. W. Orpen, having been admitted to his freedom by birth, was entitled to have his name inserted on the list of voters for the city of Dublin, notwithstanding that his father, through whom he claimed by birth, was admitted only as an honorary freeman, since the 30th of March 1831. If the Court should be of opinion that the Barrister was wrong in so deciding, the name of Charles D. W. Orpen should be expunged from the register of voters, otherwise be retained.

*C. R. Barry, Sir C. O'Loghlen and O'Hagan, against the claim.*

This is a case of first impression; but the proviso at the end of the 9th section of the Reform Act seems conversant with the case:—"Provided further, that no persons who, since the

“30th day of March 1831, have been, or hereafter shall be, admitted as honorary freemen, shall be entitled, by virtue of such admission, to vote or register as freemen under this Act.” Can a man transmit to his son a right which he never himself possessed? Can a freeman transmit a greater privilege than he can himself enjoy?—[GREENE, B. The Act of Parliament does not deprive an honorary freeman of any corporate right, it merely deprives him of a right to vote.]—The English Reform Act, 2 & 3 W. 4, c. 45, negatives such a right; and the 32nd section of that Act is analogous to the 9th section of the Irish Reform Act.—[MOORE, J. The earlier part of that 9th section is against you; the qualification does not extend to the son of an honorary freeman, though it excludes the father.]—GREENE, B. The prohibition implies that honorary freemen are to have all the other privileges of freemen, except the franchise; and if so, he has the right of transmitting to his son that which he has not.—JACKSON, J. Honorary freemen are opposed to freemen by birth, servitude or marriage, and the policy of the Legislature was to prevent the creation of occasional freemen for the purpose of voting.—GREENE, B. Suppose the case of a freeman having got his right to vote, and then becoming disqualified, how could that prevent his son being a freeman?—MOORE, J. Can you show that the claimant could be removed by *quo warranto* from the roll of freemen admitted by birth?]

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*Brereton* and *Hyndman*, contra, were not called on.

*Sir C. O'Loughlen* replied.

*Per Curiam.*

The decision of the Barrister must be affirmed.



M. T. 1856.  
*Exch. Cham.*

### M'DOWELL'S CASE.

Dec. 11.

Where several persons occupy premises jointly, some of whom were rated to the poor, others not, and the value of the premises, if divided by the number of persons rated, would give the statutable qualification to vote, but, if divided by the number of occupiers, would be too small—*Held*, that none of the occupiers was entitled to be registered.

THIS was an appeal from the decision of one of the Revising Barristers of the city of Dublin. The case stated that the name of Daniel M'Dowell appeared on list No. 7, of persons entitled to vote for said city as the occupiers of lands, &c., rated at the net annual value of £8 or upwards, or in the case of joint occupiers rated at a net annual value of such an amount as, when divided by the number of such occupiers, would give to each a net annual value of £8 or upwards. He was objected to being retained on the list, and the Barrister required it to be proved he was so entitled on the 20th of July last to have his name inserted on said list. The following is a copy of the entry of the name of Daniel M'Dowell on said list :—

Christian and Surname.	Place of Abode.	Nature of Qualification.	Description of Premises rated.	Rated value of Premises.
Daniel M'Dowell.	2 Henrietta-place.	Rated occupier of the several rateable premises herein stated.	House, shed and yard, 2 Henrietta-place.	£9.

Daniel M'Dowell and a person named Green jointly occupy the said premises as tenants thereof. Daniel M'Dowell is alone rated as the occupier of the premises under the last rate, for the time being, at the annual value of £9.

The respondent also objected to the names of the Rev. William Walsh, the Rev. Martin Crane and the Rev. John Lane being retained on the said list No. 7, of persons entitled to vote in the election of Members for the said city, and appeared in support of such objection. The Barrister held that the notice of objection served on the said Rev. William Walsh was bad, and retained his name on the list; but the objection being duly served on the Rev. M. Crane and the Rev. John Lane, he required it to be proved that they

were respectively entitled, on the 20th of July last, to have their names inserted on said list. The following is a copy of the entry of the names of the said persons on the said list :—

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Christian and Surname.	Place of Abode.	Nature of Qualification.	Description of Premises rated.	Rated value of Premises.
Rev. William Walsh, with Revs. Martin Crane and John Lane.	15 John-st. West.	Rated occupiers of the several premises rated.	Chapel-House, 15 John-st. West.	£30.

The Rev. Dr. O'Connor, the Rev. Patrick Pentony and the Rev. John Walsh jointly occupy the said premises as tenants thereof, together with the said Revs. William Walsh, Martin Crane and John Lane. The names of the last three mentioned gentlemen only appear on the last rate for the time being. The rating is £30. These cases depended on the same decision as that of Daniel M'Dowell.

The Barrister was of opinion that where premises in any city are jointly occupied by more persons than one, as tenants thereof, that, in order to entitle any one or more of such persons to have his name inserted in the list of voters as a rated occupier of such premises, it is necessary that the annual value of the premises appearing on the rate should, in the words of the 32nd section, and also of Form 7, Schedule B, of the Parliamentary Voters (Ireland) Act, be of such an amount as, when divided by the number of occupiers, would give to each such occupier a net annual value of £8 or upwards, and that where there is a discrepancy between the number of persons occupying as tenants and the number of persons rated, that the calculation should be made as was done in *Alexander's case (a)*, by dividing the annual value of such premises by the number of occupying tenants, and not by the number of persons rated. In the above cases he made the calculation on the above principle; and as the rating was not sufficient to give each of the occupying tenants the net annual value of £8, he expunged the names of the above mentioned persons from the list

(a) 5 Ir. Com. Law Rep. 45.

M. T. 1856. of voters. Against this decision the appeal was entered as a con-  
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*C. R. Barry* (with him *Sir C. O'Loughlen* and *O'Hagan*), for the appellant.

The question here is, whether the Barrister should divide by the number of persons occupying or by the rate? By 13 & 14 *Vic.*, c. 69, s. 6, a joint tenant is an occupier, and if he be solely rated he complies with all the requisites of the section. It says, when any lands, &c., "shall be jointly occupied by more persons than one, as tenants or owners thereof, and such persons shall be rated in such rate as last aforesaid jointly in respect of such premises," each of such persons shall be entitled to vote, "in case the net annual value of such premises, as appearing on such rate, when divided by the number of persons rated jointly in respect thereof, shall give a net annual value of £8 or upwards for each of such persons, but not otherwise."—[BALL, J. He is not found a joint tenant; he may or may not be so in point of law.—KEOGH, J. Suppose the two persons named, neither would have the franchise, how then can the omission of one from the rate give the other the franchise?]—There is no inquiry to be made of the other parties in occupation who are not named in the rate-book. The 33rd section speaks of "several such rated joint occupiers." The 29th section of 2 *W.* 4, c. 45, is the analogous section with the 6th section of the Irish Act, and is identical, save in the last clause, where the words are "in respect of the premises so jointly occupied," instead of "rated jointly;" arising from this, that the rate is the test of qualification in Ireland, occupation in England. There is a difference between the omission of a name and the insertion of a name, and it has been decided that the poor-rate in Ireland is not a charge in respect of the premises, but a liability on the person in respect of occupying the premises: *Guardians of Limerick Union v. White* (a). But *Meyler's case*, as reported in 8 *Ir. Jur.*, p. 74, is conclusive on the point of joint occupiers.—[BALL, J. That case decides that if there be other persons in occupation, claiming the franchise, they must be

(a) 2 *Ir. Com. Law Rep.* 630.

rated occupiers.—MOORE, J. The object of 13 & 14 *Vic.* was to create a constituency having a particular value of property.—KEOGH, J. Your construction of the Act would give the franchise to the house, not to the occupier. Would you say, if eight cabins were jointly occupied by eight persons, one of whom was rated for the entire at a valuation of £8, he would be entitled to be put on the register?—We say the qualification is given to the person on whom is thrown the burden of the poor-rate; the medium of representation is the poor-rate, and the Legislature presumes that the man who is to represent the property is the man who pays the rate.—[JACKSON, J. That would not fulfil the object of the Act, which was to have a certain amount of property represented.—MOORE, J. Your argument would give the franchise to the place, not to the occupier, whereas the spirit of the Act is to attach it on individuals.]—If the Legislature intended that all the occupiers should be rated, why change the phraseology of the Reform Act?—[BALL, J. The value of the premises, and not the rating, is in England the test, whereas in Ireland it is the rating, and not the value.—MOORE, J. The rate-books are by the 108th section made conclusive evidence, as to value, for the purposes of the Act.—BALL, J. The words in the 6th section are, “and such persons shall be rated in such rate as last aforesaid, jointly in respect of such premises.”—GREENE, B. The Legislature assumed that all persons jointly occupying should be jointly rated.—JACKSON, J. Your view of the statute would put on the registry persons possessing no interest or qualification, against the policy of the Act, which was to give the franchise to persons having a substantial qualification.]—It is not unreasonable for a person who takes on himself the burden of the rate, to claim the right to register; if there were one hundred occupiers, and one occupier was omitted from the rate, that would disqualify the whole, if the other view be correct.—[MOORE, J. Certainly not; for if the sum at which they are rated be sufficiently large, they might all qualify.—KEOGH, J. Suppose parties combine, and select some one person as their representative, how could that be corrected on the rate-book?—The Poor-law Act gives an appeal to any

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person aggrieved; and one person may appeal.—KEOGH, J. You seek to insert in the 6th section the words "as occupier rated either severally or jointly with others." The Legislature never intended to give the franchise to a locality.—MOORE, J. Or to give a double constituency.]—The 33rd section uses the words "as the rated occupiers, or one of several such rated joint occupiers, of lands," &c.—[KEOGH, J. You read the words "such rated joint occupiers" as "such joint rated occupiers."—BALL, J. As if the word "occupier" were the same as "rated occupier."—JACKSON, J. The variations in the different modes of expression in the Act show how difficult it would be to put your construction on it, against its plain policy.]—The Legislature contemplated a contribution to the burden of poor-rate; that is evident from the 11th section.—[BALL, J. That section says no person shall be entitled to be registered who has received relief under the Poor-law Acts; and yet your argument would give him a vote representing property.—JACKSON, J. Although the Act almost expressly says the franchise shall be given to a substantial person, not a pauper.]—The form of the precept of the Clerk of the Peace to the Town-clerk, No. 4, in Schedule B, also uses the words "as the rated occupier, or one of several rated joint occupiers."—[BALL, J. That but follows the words of the 33rd section.]—We rely strongly on the judgment of PENKEFATHER, B., in *Meyler's case*, as reported in 8 *Ir. Jur.*, p. 74; and though that report is not the same as in 5 *Ir. Com. Law Rep.*, p. 60, we think either report aids our view.

*Brereton and Hyndman, contra.*

In *Meyler's case* the question now before the Court did not arise: but the objection there made was that the persons claiming did not hold as tenants or owners, there having been a lease of the premises out of which they claimed, made to trustees who were not in occupation. The value of one house, in that case, divided by the number of occupiers, gave a sufficient qualification to each claimant, and so did the value of the other house to the actual occupiers. The mistake in the report in the *Jurist* is putting joint-occupier for

joint-tenant in *PENNEFATHER's*, B., judgment; for the Court only intended referring to persons jointly liable for the rent with the persons who were rated occupiers. It does not follow that if one co-tenant be omitted from a rate, the other tenants are disfranchised. The 108th section states that the rate-books are conclusive as to value of the house, but not to the value of a joint occupation.—[*BALL, J.* Is there anything in the Poor-law Act making it compulsory on all occupiers to be rated?]*—We read the 6th section of 13 & 14 Vic., c. 69, as framed in accordance with the Poor-law Act, that every occupier is rateable, that is, occupiers who by law are rateable: 1 & 2 Vic., c. 56, s. 89; Alexander's case (a).*

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 CASE.

*Sir Colman O'Loughlen* replied.

*BALL, J.*, delivered judgment.

This case has received a good deal of discussion, and we are of opinion the decision of the Barrister was right. The Legislature, in passing that 6th section of 13 & 14 *Vic.*, c. 69, had in contemplation the existing Poor-law Act, which declares that every occupier is liable to be rated, and it is the duty of the Poor-law officer to see that every occupier is rated. Then the 5th section of 13 & 14 *Vic.* provides that every male person of full age who shall occupy, as tenant or owner, premises rated for the poor-rate, at a net annual value of £8 or upwards, shall be entitled to vote; and then the 6th section provides, "that when any lands, tenements or hereditaments, shall be jointly occupied by more persons than one, as tenants or owners thereof, and such persons shall be rated in such rate as last aforesaid, jointly in respect of such premises, each of such persons shall, &c., be entitled to vote, &c., in case the net annual value of such premises, as appearing on such rate, when divided by the number of persons rated jointly in respect thereof, shall give a net annual value of £8 or upwards for each of such persons, but not otherwise." It thus deals with the case of there being more occupiers than one, jointly in possession of the premises; and, it being the law that every occupier

(a) 5 *Ir. Com. Law Rep.* 45.

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should be rated, it gives the qualification to every such joint occupier, rated jointly, in case the net annual value of the premises, as appearing on the rate, when divided by the number rated jointly, shall give a net annual value of £8 or upwards for each of such persons. That is the plain and obvious meaning of the 6th section; to hold otherwise would be to give the franchise, in many cases, to persons whom the Legislature never contemplated enjoying it. It, in fact, would give an occupier a vote, though he might not have the requisite amount of qualification. It is contended that *Meyler's case* concludes the present; and a variance in the report of the judgment of my Brother PENNEFATHER, in the 5 *Ir. Com. Law Rep.*, p. 60, and 8 *Jur.*, p. 74, has been referred to; but on looking at both reports, and recalling to my recollection the facts of that case, I am quite satisfied that the point we are now ruling did not arise there. The question in *Meyler's case* was not whether certain persons, who were not rated and jointly occupied, could give the franchise to others who were rated. Something resembling that point did arise; but it was not the point decided. The observations attributed to my Brother PENNEFATHER in the report in the *Jurist*, if accurate, are extra-judicial; but Mr. *Brereton* has given a reasonable solution of the difficulty suggested by that reported judgment, namely, that as Baron PENNEFATHER was dealing with the objection of certain persons being jointly liable with those rated to the payment of head-rent, that if, instead of the words "joint occupiers," the words "joint tenants" be read, the passage will be quite consistent. It therefore does not at all interfere with our judgment in the present case, and therefore the decision of the Barrister must be affirmed.

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*Queen's Bench*

ALEXANDER MOORE

v.

THE BELFAST & BALLYMENA RAILWAY COMPANY.

(*Queen's Bench.*)

Jan. 30.

HARRISON, on behalf of the defendants, moved that the interlocutory judgment marked in this cause, on the 20th instant, be set aside, on the grounds that same had been irregularly marked, and in contravention of the provisions of the Common Law Procedure Amendment Act (Ireland), 1853, inasmuch as no notice of the issuing of the writ of summons and plaint in this cause was given in the *Dublin Gazette* and in one of the local newspapers where the secretary of the defendants resided, as required by the provisions of the said statute; nor was any affidavit of such notice made; and that the time within which the defendants were entitled to file their appearance and defence had not yet expired; and for the costs of this motion.

The summons and plaint was dated 3rd of January 1857, and served on the 5th January, and complained that the defendants being common carriers for hire, the plaintiff, on &c., caused to be delivered to the defendants, and they received as such carriers, certain goods of the plaintiff, to be carried from Belfast to Ballymena, and there to be delivered by the defendants to the plaintiff, for certain hire; yet they did not deliver the said goods, though the plaintiff offered to pay for same, and kept same for seven days after their arrival at Ballymena. The affidavit of the secretary of the Railway Company stated they had a good defence on the merits; that no notice of the issuing of the writ in this cause had been published in the *Gazette*, or local papers, as required by the statute; and being

A plaintiff, having sued a Railway Company for breach of duty as carriers, served the writ of summons and plaint on the secretary of the Company, and without giving notice of action in the *Dublin Gazette*, and one of the local newspapers, marked judgment for want of a defence within the statutable period.—

*Held*, that such proceeding was irregular, and that the 135th section of the Companies Clauses Act, which declares service on the secretary of a Company to be good, is impliedly repealed by the Procedure Amendment Act, 1853; and therefore, before marking judgment against a Railway Company,

it is necessary to give notice in the *Gazette* and one of the local newspapers of the issuing of the writ of summons and plaint.

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advised that it was not necessary to file a defence until the expiration of twelve days after the publication of said notice, no defence was filed. That on the 20th of January, he, for the first time, heard interlocutory judgment had been marked by the plaintiff on that day, and submitted that same was quite irregular. Another affidavit was made by the attorney of the defendants, to the effect that he searched the files of the *Dublin Gazette*, on the 20th of January, from the 1st of January to that time, and that notice of this action had not been published therein; and that having made inquiries in the *Gazette* office, he was informed that no such notice had been brought for insertion, and on the 20th instant found that no affidavit of publication had been lodged in the office of marking judgments, nothing but the usual affidavit of service, and that the Master had allowed judgment to be marked without publication.

*Harrison*, for the motion.

The question rests on the 32nd and 33rd sections of the Common Law Procedure Amendment Act (Ireland), 1853. The 32nd section directs that service of the writ of summons and plaint shall be effected either by delivery of a copy of such writ to the defendant in person, if practicable; and in other cases, where it appears that the defendant is personally within the jurisdiction, it shall be sufficient to make service of the writ by leaving it at the defendant's house or place of residence, or office, &c., with the wife, child, father, mother, brother or sister of the defendant, or with any servant or clerk of the defendant, being above the age of sixteen years, &c.: and the 33rd section provides that service of any such writ of summons and plaint, issued against a Corporation aggregate, may be effected either by delivery of a copy of such writ to the Mayor or head officer, in person, or to the Town-clerk, treasurer, or secretary of such Corporation, &c.; and if any such defendant shall not appear, and take defence according to the exigency of such writ, in due time after such service thereof, upon affidavit made as thereafter provided, of such personal service of such writ, and of the publication of the notice thereafter provided, it shall be lawful for the plaintiff to proceed as thereafter provided:

provided always, that in all such cases a sufficient notice of the issuing of the writ shall be given in the *Dublin Gazette*, and in one of the local newspapers of the county, city or district in which the defendant or defendants, or the officer or agent to be served, shall reside; the days for filing an appearance and defence to run in such case from the day of the publication of such notice in the *Gazette* or newspaper, whichever shall be the latest. The 96th section of this same Act provides for the case of no defence being filed within the time specified; that on plaintiff filing an affidavit of service of the writ of summons and of the notice of filing and certificate of no defence, he may sign judgment: and the 99th section says it shall be the duty of the Master, before he permits any such judgment to be marked, to see that a proper affidavit of the service of the writ of summons and plaint has been filed, and that, according to such affidavit, service of such writ has been effected in the manner prescribed by the Act. It will be argued that the Lands Clauses Consolidation Act, 8 & 9 Vic., c. 16, is not repealed by the Procedure Act; but it is so impliedly as to service: *Macnamara v. The Waterford and Limerick Railway Company* (a).

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*D. McCausland, contra.*

We say this service of the secretary was regular. Railway Companies have particular codes and regulations, and the Companies Clauses Act and Lands Clauses and Railways Clauses Acts provide for their management. Service may be made on Railway Companies by serving the secretary: 8 & 9 Vic., c. 16, s. 135—"Any summons "or notice, or any writ or other proceeding at Law or in Equity, "requiring to be served upon the Company, may be served by the "same being left at or transmitted through the post, directed to the "principal office of the Company, or one of their principal offices, "where there shall be more than one, or being given personally "to the secretary; or, in case there be no secretary, then by being "given to any one director of the Company." A similar provision is in the Lands and Railways Clauses Acts. Now has that mode of service been repealed by the 37th or 39th sections of the Pro-

(a) 8 Ir. Jur., C. P., 125.

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cedure Act?—[PERRIN, J. Your argument is, that as to any other Company save a Railway Company, notice in the *Gazette* must be given, but that it is not necessary in the case of a Railway Company.—CRAMPTON, J. Do Railway Companies come under the words "Corporation aggregate," in the Procedure Act?—Unless that section of the Companies Clauses Act be repealed by the Procedure Act, the judgment is regular.—[LEFROY, C. J. The Master of the Court, by the 99th section of the Procedure Act, can only act on evidence of proceedings under that Act.]—It would be sufficient even if service had been made through the Post-office, or on a director of the Company, for, on an affidavit of that fact, the officer would be obliged to mark judgment.

*Harrison* replied, referring to the 19th section of the Procedure Act 1853, providing that all statutes relating to actions, &c., not hereby repealed, or inconsistent with the provisions of this Act, should apply; and argued that the 135th section of the Companies Clauses Act was quite inconsistent with the Procedure Act.

LEFROY, C. J.

This Common Law Procedure Amendment Act was intended to affect all individuals and public bodies; and it would be singular if, with that intention in view, the Legislature omitted to provide for so important and numerous a class as Railway Companies. The Procedure Act deals with proceedings against all persons and Companies; and the Master, before he permits the marking judgment, is to inquire if the preliminaries required by the Procedure Act have been complied with; that an affidavit of service has been filed, and that the service has been effected in the manner prescribed by the Act: he can only judge of that by the enactments of this Act. Though therefore there be not a direct repeal of the section of the Companies Clauses Act referred to by the Procedure Act, yet, so far as that provision is inconsistent with the Procedure Act, it is repealed. This judgment must be set aside, with costs.

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*Queen's Bench*

## ALEXANDER v. GODLEY.

Jan. 22, 30.

THIS was a special case stated for the opinion of this Court. It stated that the Earl of Mountcashell, by lease, bearing date the 2nd of March 1816, demised to Earl O'Neill the lands of Claggan, for the lives of the said Earl O'Neill, his brother, afterwards Viscount O'Neill, and Henry O'Hara and the survivor of them, or for the term of thirty-one years, whichever should longest continue, subject to the rent and covenants therein.

That after the execution of said lease, Earl O'Neill planted a large number of trees on said lands, and duly registered same, in pursuance of the statutes in that behalf.

That Earl O'Neill, being so seised of said lands, and of other extensive estates, and being indebted in divers sums, part of which is still unpaid, on mortgage and judgments affecting the said freehold estates, of which he died seised, and indebted in divers simple contract debts, which were all paid during the lifetime of Viscount O'Neill, duly made his will, dated the 21st of November 1832; whereby, after reciting that he was seised in fee-simple of the lordships and territories of the Largess and Braid, and manors of Cashell and Buckna, and that by the will of his father, John Viscount O'Neill, dated the 12th of March 1796, the said Viscount devised to trustees therein named, their heirs and assigns, the lordships, territories, manors, &c., of Montarnedy and Feevagh,

leaseholds into freeholds, he specifically devised the same, and such as he should thereafter purchase, upon the same trusts. At the time of making this will and codicil, he was seised under a lease of an estate for lives.—*Held*, that that leasehold interest did not pass to the trustees under the will and codicil, but descended upon the heir-at-law of the testator.

A, in his lifetime, planted timber trees on said leasehold estate, and duly registered the same, and died without having felled the timber, and was succeeded by B, his heir-at-law, the surviving life in the lease. After the death of B, and within twelve months after his decease, his personal representatives cut the timber.

*Held*, that at Common Law, the timber was part of the inheritance until severed; out that when severed, it became a mere chattel; and that under the Timber Acts, the tenant not having felled said trees during the existence of the lease, they remained part of the inheritance, and descended with the land.

A, by his will, dated the 21st of November 1832, reciting that he was seised in fee-simple of certain estates, and also of the reversion in fee in certain settled estates, and that he was desirous of settling and disposing of his unsettled and other estates, devised to trustees all the lands of which he was seised in fee-simple, and also his reversion in fee of his settled estates, and all his estate and interest in said estates respectively, upon certain trusts therein named; and by a codicil, reciting that he had purchased certain freeholds, and had converted

H. T. 1857. *Queen's Bench* and the manors of Edenduffcarcick and Mallaghgawa, to the use of the said Earl (testator) for his life, remainder to his first and other sons in tail male, remainder to testator's brother for life, remainder to his first and other sons in tail male, remainder to testator's daughters in tail, remainder to the daughters of testator's brother in tail, remainder to Mary Anne O'Neill for life, remainder to her first and other sons in tail male (and divers remainders over), with ultimate remainders to testator's right heirs for ever. That the ultimate remainder or reversion in fee-simple in said settled estates, expectant on the determination of said prior limitations, had descended and was then vested in the said Earl O'Neill, and that he was desirous to settle and dispose thereof, and to settle his unsettled and other estates by his will. That the said testator devised to John Godley and John M'Neill and their heirs, subject to the term of 500 years therein limited, all his lordships and territories, of which he was seised in fee-simple, and also the ultimate remainder or reversion in said settled estates, subject to the prior limitations in his father's will, and all his estate and interest in said estates respectively, to the use of testator's first and other sons in tail male, with remainder to the use of his brother John Bruce, afterwards Viscount O'Neill, for life, with remainder, after other limitations which did not take effect, to the Rev. William Chichester for life, remainder to his first and other sons in tail male, with divers remainders over. That said will contained a power to tenants for life respectively, when in possession, to make leases for three lives or thirty-one years; a power to tenants for life respectively to charge said estates with a jointure of £1000 per annum, and £15,000 for younger children, if more than two, and if but two, then with £10,000. That as to the trust term of 500 years, his trustees should stand and be possessed of testator's fee-simple estate and his settled estates, when his reversion in fee therein should take effect, for the said term of 500 years, to be computed from his death; upon trust, to levy and raise such sums as should be sufficient to pay the receiver's fees and the interest due on the several debts, charges and incumbrances affecting the same, and apply the same accordingly; and upon further trust, until

the said debts, charges and incumbrances were paid off, to levy and raise out of the rents, issues and profits thereof, an annual sum of £3000, by equal half-yearly payments; and from time to time, as and when a particular debt should accumulate, to pay off any particular debt, then to apply the same in liquidation of the principal sums due on foot thereof, and also in liquidation of such part of the simple contract debts as testator therein directed to be paid out of his real estates, in the event of his personal estate being insufficient for that purpose, and so from time to time, until said debts and charges were paid off; that the simple contract debts were, if possible, to have precedence; and until said reversion in fee should take effect, the said fund and its accumulations should be entirely applied in discharge of the debts affecting his fee-simple estates and of his simple contract debts, and that his trustees' receipts should be valid discharges. That subject to the trusts, the trustees were to allow the rents and profits of said estates to be received by the persons entitled in remainder, subject to said term, and that said term was to cease when the trusts were satisfied; and in order to protect the trustees, their accounts were to be made annually, and to be settled and signed by the persons beneficially entitled to such estates under the limitations.

The will further recited that testator was possessed of certain lands in the county of Antrim, held under the See of Down and Connor, and bequeathed the said lands and all testator's interest therein to his trustees, in trust to pay the head-rent and renewal fines, and to stand possessed of said lands upon trusts, powers, &c., similar to the uses thereinbefore declared of testator's fee-simple and freehold lands, or as near thereto as the rules of Law and Equity would permit.

The will also contained a recital that, by indenture of the 1st of October 1825, testator had charged an annuity of £200 upon certain portions of his said estate, in favour of Anne Barker, and by said will he ratified said charge, and gave and bequeathed to his said trustees, their executors and administrators, all his personal estate and effects of every kind, of which he should be possessed

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**H. T. 1857.** at the time of his decease, upon trust to call in and convert the  
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**ALEXANDER** same into money, and apply the same in discharge of his simple  
**v.** contract debts, so far as same would extend, and of any legacies he  
**GODLEY.** might bequeath by codicil to his last will ; and in case of any

deficiency for these purposes, he charged such deficiency upon his real estate; and in the event of any surplus, it was to be applied by his trustees in aid of the sinking fund before provided; and he appointed John Godley and John M'Neill executors of his will. By a codicil of the 20th of November 1832, he bequeathed to each trustee £300.

By a second codicil, of the 3rd of January 1833, he appointed A. M'Manus a trustee in place of John M'Neill.

By a third codicil, of the 16th of January 1838, he appointed his brother trustee and executor in place of A. M'Manus.

By a fourth codicil, of the 24th of February 1840, reciting he had purchased the freehold of the bishop's lands mentioned in his will, under the provisions of the Church Temporalities Act, and had also purchased the Ballynagarvy estates, containing 1210 acres, and an island called Rams Island in Lough Neagh, and reciting the different charges created by his will, he revoked the appointment of his brother as trustee, and appointed James Saurin in his place, and he devised to his trustees the lands mentioned in the codicil, and all the freehold lands he might thereafter purchase or acquire, to the same uses as declared by his will of his fee-simple estates; and he bequeathed to the trustees any money he might have invested in the £3 per cent. consolidated annuities, in the Bank of England or Ireland, to go as a sinking fund to pay off sums due on mortgage on the estates to which he was absolutely entitled, and particularly of any debt secured in the Largy and Braid, or any other of his fee-simple estates.

The case further stated that Earl O'Neill died on the 26th of March 1841, and that probate of his will was granted to his brother, Viscount O'Neill, who was heir-at-law and sole next-of-kin of testator; and that he entered upon the receipt of the rents and profits of the O'Neill estates immediately after his death, and also upon the receipt of the rents and profits of the Claggan estate, and that

John Godley and James Saurin accepted the trusts of said will. H. T. 1857.

That Henry O'Hara, one of the *cestui que vies* in the lease of 1816, died during Earl O'Neill's life.

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That Viscount O'Neill, on the 9th of January 1854, made his will, devising the residue of his estate and effects, after certain specific devises and bequests, to Henry Alexander, including in said residue all rent and arrears of rent, and all timber or other trees, to which testator or his representatives might be entitled; and he appointed said Henry Alexander to be trustee and executor of his will.

That Viscount O'Neill died on the 12th of February 1855, and that the said lease of Claggan determined by his death. That upon his decease, W. Chichester O'Neill entered upon the receipt of the rents and profits of the lands mentioned in Earl O'Neill's will, as tenant for life thereof, all the prior limitations in the will having determined.

That within one year after Viscount O'Neill's death, the said John Godley and James Saurin, without the licence and against the consent of the said Henry Alexander, entered upon the lands of Claggan, and cut down five of the timber trees, of the value of £20, then growing thereon, and which had been so planted on the lands and registered by Earl O'Neill, and sold and disposed of the same.

The question for the Court in this case was, whether, at the time of the sale and disposal of the said trees, as hereinbefore mentioned, the property therein was vested in the said Henry Alexander, as such trustee and executor of the said Viscount O'Neill, or in the said John Godley and James Saurin as such trustees of the will of the said Earl O'Neill? Secondly, whether such trees formed part of the personal estate of the said Earl O'Neill?

*Harrison and Napier*, for the plaintiff.

The will of Earl O'Neill does not at all interfere with or dispose of the lands of Claggan; it deals with nothing but his lordships and larger territories. The fourth codicil is important, but it deals



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only with the lands held under the See of Down and Connor, with Rams Island and the Ballynagarvy estate; it neither touches Claggan. The intention of Earl O'Neill was clearly not to die intestate, as to any of his lands; but there is no disinheritance of his heir, and there must be express words to disinherit the heir. It is needless to cite authority for that position. The will would ordinarily date from the publication of the last codicil; and the recent Statute of Wills does not affect it: *Cole v. Scott* (a). Every will should be construed as if it had been executed immediately before the death of the testator, unless a contrary intention appear.

If, before Earl O'Neill bought the lands of Claggan, the trees were unregistered, they would pass with the devise of the land. The Timber Acts were framed with the view of encouraging planting, to give the tenant of the lands, who planted, the benefit of the planting as against the reversioner; but these Acts say nothing as to the respective rights of personal representatives and remaindermen. The first Act necessary to advert to is 9 G. 2, c. 7, and its recital is an index to its object:—"Whereas persons seised of "estates for life, with remainders over, have often improved their "estates by planting of timber trees; and whereas the benefit of "such improvements, by the laws now in being, descends entirely "to the person next in reversion or remainder, without any consideration had for such improvement, to the frequent impoverishment of younger children, and ruin of creditors," &c. It then enacts, "That if any person seised of an estate for life, or in tail, "with a remainder or remainders over, shall in his lifetime plant, " &c., in every such case, the executor or executors, administrator "or administrators of such tenant for life, or tenant in tail, shall "be entitled to the moiety of such trees," &c.; and it then provides that the executors or administrators shall, within one year after the death of the tenant, have an inquiry made by the Sheriff, &c. Who is the tenant here? Surely the person seised of the land. Viscount O'Neill was the last life in the lease of Claggan, both surviving *cestui que vie* and tenant.—[CRAMPTON, J. The question

(a) 1 Hall & Twells, 477.

really is, who was the tenant? The 5 & 6 G. 3, c. 17, s. 4, enacts, "That in all cases where the expiration of the term of the tenant is uncertain, the tenant, paying the rent and performing the other covenants in his lease, shall be at liberty, for the space of one year next after the expiration of his term, to enter on the lands, and cut and fell in due seasons all the trees so planted and registered, &c.; and where the expiration of the term is certain, the tenant, during the last year of his term, paying the rent and performing the covenants, may in like manner cut and carry away such trees so planted and registered." Then 23 & 24 G. 3, c. 39, s. 3, directs that if any tenant incloses ground, containing coppice-wood, which he is not bound by his lease to inclose, the tenant shall have power to cut, sell and dispose of the trees which shall grow from such coppice at any time during his term. Then the 4th section enacts, that before inclosing the ground, the tenant is to give notice at a Quarter Sessions of his intention to inclose; and by the 5th section a map of the ground, and an affidavit as there specified, is to be lodged with the Clerk of the Peace, and filed. Then the 7th section enacts, "That any tenant may sell his or her right, title and property in said trees or coppices, or any part of the same, to any person under whom he or she may derive mediately or immediately, and that the person so purchasing shall have all rights, titles and properties and privileges therein which are, or by this Act shall be, secured to said tenant." The 8th section says, no sale or transfer of the trees shall be good unless the same be in writing, and signed by the tenant, attested by witnesses and lodged with the Clerk of the Peace. The 9th section provides for the case of the term of the tenant entitled to the trees being uncertain, and provides that he "shall have the same liberty, for the space of one year after the expiration of his lease, to enter upon said lands, and to cut, carry away and dispose of the said trees, as if his lease had been unexpired, making reasonable compensation for damages incurred by so doing," &c.; and the 10th section, which provides for the reversioner purchasing the trees, says, "If the said reversioner or inheritor shall not pay to the said tenant, or to his or her legal representatives, the sum so awarded," &c.

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H. T. 1857. *Herbert v. Jameson* (a) is overruled by *Standish v. Murphy* (b).—  
*Queen's Bench* MOORE, J. In *Standish v. Murphy*, the party was assignee of the  
ALEXANDER whole lease; in *Herbert v. Jameson* there was a sub-lease.]—Do  
v. GODLEY. the trees become chattels on the expiration of the lease? If it  
be so held, great inconvenience will follow, because the object of  
23 & 24 G. 3 was to give the person interested in the soil a property  
in the trees. If on the personal estate clause in the will, the  
trees went to the trustees, they might have come on the lands,  
and cut them during the life of the *cestui que vie*; and if they did  
not do so till his death, the trees remained in the tenant.—[CRAM-  
TON, J. Does not the statute separate the property in the trees  
from the property in the land?—Yes, if the right were exercised:  
*Lifford's case* (c). Severance is the test at Common Law, and why  
not the test under the statute?—[MOORE, J. A question might  
have arisen between the personal representative of Earl O'Neill  
and personal representative of Viscount O'Neill, if they had been  
different persons.]—We admit the case is against us if they be  
considered personal estate.

*Lawson and Joy*, for the trustees of Earl O'Neill.

The lands passed to the trustees for the term of 500 years, and  
the term was created for the payment of debts. The Earl thought  
he had passed everything, for his codicil disposes of estates he  
may die seised or possessed of. There is no residuary clause as  
to the real estate.—[PERRIN, J. The lease may have been taken  
merely for planting.]—It contains 101 acres. The will of the Earl  
was re-published by the codicil, and therefore comes within the  
new Wills Act, because that codicil bears date after the 1st of  
January 1838. Section 26 of that Act (1 *Vic.*, c. 26) says:—  
“That a devise of the land of the testator, or of the land of  
“the testator in any place, or in the occupation of any person  
“mentioned in his will, or otherwise described in a general manner,  
“and any other general devise which could describe a customary,  
“copyhold or leasehold estate, if the testator had no freehold estate

(a) 6 Law Rec., N. S., 92.

(b) 2 Ir. Ch. Rep. 264.

(c) 11 Co. Rep. 46 b.

“ which could be described by it, shall be construed to include the  
 “ customary, copyhold and leasehold estates of the testator, &c., or  
 “ any of them to which such description shall extend, &c., as well  
 “ as freehold estates,” &c.

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Assuming that the lands of Claggan were undisposed of by the will, Viscount O'Neill, on the death of the Earl, took them as special occupant marked out by the grant for the residue of the term, and not by descent (a). The Timber Acts abolish and repeal the maxim “ *quisquid plantatur solo, solo cedit.*”

From the time of the registry, they are things which cease to be annexed to the freehold, and things to which that maxim cannot apply. The object of the Timber Acts was to give the trees to those who planted them. 5 & 6 G. 3, c. 17, in its recital says:—  
 “Whereas it is equal to inheritors whether tenants do not plant,  
 “or have a property in what they plant, be it enacted, &c.,  
 “that tenants for lives renewable for ever, paying the rents and  
 “performing the other covenants in their leases, shall not be  
 “impeachable of waste in timber trees or woods which they shall  
 “hereafter plant,” &c. The 2nd section of the statute gives the tenant for life the sole property of the trees planted during the continuance of the term, and at the end of the term he shall be entitled to the trees or the value of them. The interest of a tenant under a settlement, on his death, goes to his personal representative.—[MOORE, J. If the trees had been expressly devised by name, it might have been a different matter, but the words in the will are “personal property.”]—But we say the Timber Acts make them personal property. The 4th section of 5 & 6 G. 3, c. 17, is all-important.—[CRAMPTON, J. In one view of the case, trees are neither real or personal property, they are of a mixed character. You say they are personal property the moment they are registered.—MOORE, J. They are real property when planted, subject afterwards to be made personal property.]—In *Wentworth's Office of Executors*, p. 148, it is said:—“Being in consideration of things  
 “growing on the ground, let us not forget to think of trees sold  
 “by J. S., seised of the inheritance of the land, to J. D., who

(a) 2 Bl. Com. 259.

H. T. 1857. "died before felling: this interest is a chattel, which shall go to Queen's Bench "the executor, and not to the heir of J. D.; but some colour may  
ALEXANDER v. GODLEY. "be that these, because fixed to the soil and freehold, are real  
"chattels, as the interest in land is, and not personal. So also  
"of trees excepted by him who selleth the inheritance of the land:"  
*Herlakenden's case* (a). The trees were the property of him who  
planted them.—[PERRIN, J. When do you say they were severed?]  
—When the affidavit of registry was made: *Galway v. Baker* (b);  
*Smith v. Surman* (c); *Lord Dudley v. Lord Ward* (d); *Stukeley*  
*v. Butler* (e). Once it is established that they were personalty, they  
go to the trustees.—[CRAMPTON, J. Then it comes to a question of  
construction on the will.]—As to what passes under a will: *Weigall*  
*v. Brome* (f); *Wilson v. Eden* (g).

*Napier* replied.

Earl O'Neill had, undoubtedly, power to dispose of the freehold estate and of the trees in his lifetime; but the statute did not alter the character of the trees, and as he did not dispose of the trees, and the statute did not sever them, so, as he did not give the freehold of Claggan, neither did he give the trees away from his heir-at-law. The case is not unlike the case of fixtures between heir and lessee: *Lee v. Ridsen* (h); *Mackintosh v. Trotter* (i); *Rodwell v. Phillips* (k); *Fisher v. Dixon* (l); *Shep. Touch.*, p. 472.

*Cur. ad. vult.*

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CRAMPTON, J.

Jan. 30. The action in this cause is trover, and it comes before us on a special case. The plaintiff is the executor of the late Viscount O'Neill, who died on the 12th of February 1855. He is also the executor of the late Earl O'Neill, the predecessor of Viscount

(a) 4 Coke, 62 a.

(c) 9 B. & C. 561.

(e) Hob. 173.

(g) 18 Q. B. 474.

(i) 3 M. & W. 184.

(b) 7 Cl. & F. 379.

(d) Amb. 113.

(f) 6 Sim. 99.

(h) 7 Taunt. 188.

(k) 9 M. & W. 505.

(l) 12 Cl. & F. 312.

O'Neill; but nothing turns on this latter fact. The defendants are trustees and devisees under the will of Earl O'Neill, and also devisees of his personal estate.

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Two questions have been raised between the parties to this record. The first is on the construction of the will of Earl O'Neill, under which the defendants derive their title. The second question arises upon the construction of the Irish Planting Acts. If both these questions are decided in favour of the plaintiff, he is entitled to our judgment: if either of them be determined in the defendants' favour, our judgment should be for them.

I shall first state the material facts upon which these two questions arise.

It appears from the special case before us, that by a lease, bearing date the 2nd of March 1816, the Earl of Mountcashell (who was seised in fee of the premises) demised to Earl O'Neill and his heirs the lands of Claggan, in the county of Antrim, for a term of three lives or thirty-one years. The lives named in the lease were the Earl O'Neill, the lessee, his brother and heir presumptive, afterwards Viscount O'Neill, and Alexander O'Hara. The surviving *cestui que vie* was the Viscount O'Neill. The lease, therefore, expired with him in February 1855. It appears that the Earl O'Neill, being under this lease in possession of the lands of Claggan, planted upon those lands a considerable number of timber trees, and had them duly registered under the Planting Acts.

The Earl O'Neill died on the 26th of March 1841, without issue, leaving the late Viscount O'Neill his brother and heir-at-law. The Earl had not cut down the trees growing upon Claggan, and registered as aforesaid. The Viscount O'Neill, upon his brother's death, entered upon the lands of Claggan (*inter alia*), and continued to hold and enjoy the same until his death in 1855, when the lease expired. Within a year after the death of Viscount O'Neill, the defendants, claiming as trustees and devisees under the will of Earl O'Neill, entered upon the lands of Claggan, and felled the timber trees growing thereon, and so registered by their testator: and it is as to the property in the timber trees so felled that the question in this case arises; the plaintiff, as

H. T. 1857. executor of Viscount O'Neill, claiming also the property in this timber.

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We have then in the first instance to determine whether the lands of Claggan passed to the defendants under the will of Earl O'Neill, or whether they devolved upon Viscount O'Neill as heir-at-law or special occupant? To determine this question, we must look into the will of Earl O'Neill. That will bears date the 21st of November 1832: there are four codicils to it; but it is only the last codicil, dated the 24th of February 1840, which has any bearing upon the case. It is admitted that there is in these documents no express devise of the freehold lease of Claggan; but it is argued on the defendants' part, that it is plain from the whole will and codicils that the testator did not intend to die intestate as to any portion of his property, and that there are general words in the will and codicil sufficient to include Claggan in the devise to the defendants.

Now I stop not to inquire whether such an intention did or did not exist in the mind of the testator? for if there be not words in the will and codicil to carry out that intention, the legal result must follow. The heir cannot be disinherited, except by express words, or by a necessary implication. This doctrine is too well established to require the citation of authorities in its support. But there are some words in the judgment of Lord Eldon, in the well-known case of *Shuldam v. Smith* (a), so apposite, that I cannot but quote them. In p. 56, Lord Eldon says:—"I have seldom been more disturbed about any case than about this; for I have not the least doubt (if your Lordships should concur in the opinion of the Judges) but that *the actual* intent of the testator must be disappointed. But the question is, whether there is here that intelligible expression of intention which shows how the property is disposed of to the exclusion of the heir, who never claims by force of the intent, *but by the rule of law?*" Now I can see no such words, and no such implication in this will and codicils, as to intercept the application of the rule of law in favour of the heir.

(a) 6 Dow., P. C., 22.

The will recites the testator's seisin in fee-simple in certain estates specified therein, and also his reversion in fee in certain other settled estates therein also specified; and it further recites that the testator "is desirous to settle and dispose of his unsettled *and other estates*, by that his will, in manner and for the purposes "thereinafter declared concerning the same." He then proceeds to devise to the trustees named in his will, subject to a trust term for five hundred years thereafter limited to the trustees (now represented by the defendants), all the lands of which he was seised in fee-simple, and also the reversion in fee in the settled estates, and all his estate and interest in the said estates respectively, to the uses and upon the trusts therein limited, and which it is unnecessary here to particularise; and as to the term of five hundred years (now vested in the defendants upon this record), the testator proceeds to declare the trusts thereof, the first of which is to raise a fund for the payment of incumbrances, and of his own personal debts.

It is plain upon the face of the will then that it is conversant only about the unsettled fee-simple estates of the testator, and the reversion in fee in the settled estates, all of which are specifically named in the will. The defendants' Counsel rely on the general words "*other estates*," in the recital, which says, "I am desirous to settle and dispose of my unsettled *and other estates*;" and they argue that under those general words the freehold lease of Claggan should be held to pass. They also rely on the general words "all my estate and interest in the said estates respectively." But the answer is obvious; first, they are by the context confined to the reversion in fee in the unsettled estates and to the fee-simple estates specified; secondly, such general words could not be received to disinherit an heir-at-law or a special occupant; for in this respect I know no difference between these two classes of heirs. Then the fourth codicil does no more for the defendants than the will has done; it recites that the testator had recently purchased certain freeholds, and converted certain leaseholds into freehold, and devises specifically the same, as well as such as he should thereafter purchase; but, like the will, it leaves Claggan untouched, though it may be

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H. T. 1857. admitted that it goes some way to show that the testator seems to have thought that he had before disposed of Claggan ; but whether Claggan was forgotten or omitted by his mistake can make no difference. We are of opinion, therefore, that the lands of Claggan did not pass to the defendants under the will and codicils of the Earl O'Neill.

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But secondly, the defendants claim the timber in question as part of the *personal* estate of the late Earl O'Neill. The question thus raised appears to be quite a novel one, and must be determined by the construction of the Planting Acts, especially the 23 & 24 G. 3, c. 39. But let us first see what the view of the Common Law is upon the subject; for it is well laid down in *Heydon's case* (a), that in the interpretation of statutes *it is well to consider what was the Common Law at the time when the particular statute was enacted*. I apprehend then, that by the Common Law, growing timber was part and parcel of the inheritance, just as much as the soil upon which the trees were growing, and that if by grant the property in the trees was severed from the inheritance, the grantee acquired a qualified property thereby; that is, he became entitled at his pleasure to enter and fell the trees, to carry away the timber so felled; and that such timber, when so felled, thereupon became mere chattels and were part of the personal property of the grantee; but that, so long as the trees remained unfelled, they retained the character of realty, though *potentially* separated from the inheritance; the grantee having thus the power at any time during the subsistence of his title to convert (by felling them) the growing timber into a chattel. These positions seem to be established by *Herlakenden's case* (b), and by *Liford's case* (c). In *Liford's case*, in reference to a lease of the land, reserving the trees, we find it thus laid down:—"And it was resolved although, *fictione juris quoad* the lessee, the tree is divided from "the freehold, yet in fact and truth, as to all others, it is "parcel of the lessor's inheritance; for it was said that timber "trees *cannot be felled with a goose quill*; as if tenant in tail sells "the trees to another, now they are a chattel in the vendee, and

(a) 3 Rep. 7.

(b) 4 Rep. 63 b.

11 Rep. 50 a.

"his executors shall have them, and in such case, *fictions juris*, they  
 "are severed from the land: but if tenant in tail dies before actual  
 "severance, as to the issue in tail they are parcel of his inheritance  
 "and shall go with it, and the vendee cannot take them; and yet,  
 "*quoad* the tenant in tail, they are divided for a time, but *quoad*  
 "the lessee, and all others, they remain parcel of the inheritance."

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Now taking this Common Law doctrine for our interpreter, let us look to the statute of the 23 & 24 G. 3, c. 39, for it is unnecessary to go beyond that statute. The 1st section enacts that "The tenant shall be entitled to cut, sell and dispose of the same (viz., the registered trees), or any part of the same *during the term*." The words "during the term" are significant. By the 9th section, this power is enlarged, for it enacts "that *where* the tenant's term is for life or uncertain, the tenant shall have the same liberty, for the space of a year after the expiration of his lease, to enter upon the lands, and to cut, carry away and dispose of the timber as if his lease were unexpired;" thus clearly marking that the tenant must exercise the right of felling the timber trees during the subsistence of his term, except in the cases provided for by the 9th section. If, instead of exercising this privilege, the tenant suffer the trees to remain unfelled, they remain part of the inheritance, and will descend with the land on which they grow. The 7th section also leads to the same conclusion, for it enables the tenant to sell the growing timber, not generally to any stranger, but in a qualified manner, to the person or persons under whom he may derive immediately or immediately. I add, that by "the tenant" in this and in other sections of the statute is meant, not merely the lessee (as the defendants' Counsel contended), but the tenant in possession (whoever he was), on "paying the rent and performing the covenants in the lease." If then, as it thus appears, the tenant could not convey the property in growing timber to a stranger, how much less could he devise them as personal chattels?

The Earl O'Neill then not having exercised his right of felling the timber trees, their real character continued upon his death, and they descended with the land to his heir, the Viscount O'Neill; and under the provisions of the 9th section of the statute referred to

H. T. 1857. (the trees remaining uncut at the time of the Viscount's death and at the expiration of the lease), the executor of Viscount O'Neill was entitled within the succeeding year to enter, and to cut and carry away the timber trees. Within the year the trees were felled, and having been so felled, they became the property of the plaintiff as executor of Viscount O'Neill. Upon these grounds, we are clearly of opinion that the trees in question formed no part of the personal estate of the late Earl O'Neill, but that as soon as severed they became the property of the plaintiff, as executor of the late Viscount O'Neill. It follows, therefore, that the plaintiff is entitled to judgment.

Judgment for plaintiff.

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Jan. 30.

April 29.

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A rental, published under an order of the Commissioners of the Incumbered Estates Court, stated that the lands intended to be sold were subject to a lease, at a certain rent, which rent had been abated; and the schedule to the conveyance executed by the Commissioners adopted this rental.—

*Held*, in an action by the purchaser under this conveyance, claiming the full rent, that this rental, and proof of payment of the abated rent for 18 years prior to the sale, was no answer to the action.—(FERBIN, J., *dissentiente*.)

This was a special case stated for the opinion of this Court, under the 92nd section of the Common Law Procedure Amendment Act (Ireland) 1853.

The case stated, that William Pole, of Ballyfinn, in the Queen's County, being seised in fee-simple, among others, of the town and lands of Ballyobin, barony of Moycashel, and county of Westmeath, duly made his will on the 26th of February 1774, and thereby devised all his estates in Ireland to trustees, in trust for his wife, for life, then to the use of William Wellesley and his assigns for his life, then to the use of the said trustees to preserve the contingent remainders, and from and after the decease of William Wellesley, to his issue in tale mail, with divers remainders over. In said will was reserved a power to William Wellesley, while in possession of the estates so devised, to make a lease or leases at the best improved yearly

rents, without taking any fine for the making thereof, for any term not exceeding three lives or thirty-one years. The testator died in 1781, without altering said will.

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William Wellesley having entered into possession of the estates so devised, in exercise of the powers so vested in him, by indenture of demise, dated the 1st of November 1810, demised to Patrick Daly, his heirs, executors and assigns (subject to the obtaining such license as therein mentioned), 19a. 1r. 30p. of the lands of Ballyobin, in the Queen's County, *habendum* for a life still in being, or for a term of twenty-one years, at the yearly rent of £23. 19s., Irish currency, free of taxes (quit and crown rent excepted), payable quarterly; in which lease was inserted a clause against subletting without consent of William Pole, and on breach thereof to pay an increased additional rent of £80, with covenants to pay rents and keep in repair, and the usual clauses of distress and re-entry. The life in the lease is still in being.

Patrick Daly held the lands until his death in 1837, when Thomas Daly, the defendant, entered, and now holds possession under the lease. William Wellesley received the rent reserved by the lease from the lessee Patrick Daly for several years, but afterwards received an abated rent thereout from him, at the rate of £11. 7s. 4d. by the year, and afterwards received the same abated rent of £11. 7s. 4d. from the defendant, from the time of his entry in the year 1837, up to the time of the death of William Wellesley in the year 1846. Upon the death of William Wellesley, the Earl of Mornington became seised of the premises subject to the lease. In the year 1847, on the decease of William Wellesley, a bill was filed against the Earl of Mornington, and a receiver was appointed over the estates, and Thomas Daly paid rent to the receiver for the premises demised by the lease, and held by him thereunder at the abated rent of £8. 10s. 6d., up to the 1st of November 1853, the rent having been reduced to said last mentioned sum pursuant to the directions of the Master in the cause.

In the year 1854, certain of the estates, the subject of said suit, including the premises, were duly sold by the Commissioners for the Sale of Incumbered Estates; and the Commissioners, by deed

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of conveyance, bearing date the 16th of May 1854, granted the premises unto the plaintiff, his heirs and assigns, for ever, subject to the leases and tenancies referred to in the schedule thereunto annexed, which schedule, as far as the present defendant's holding was concerned, was as follows: \*—

The other denominations and tenants' names, quantities of land and rent were also in the schedule which was signed by two of the Commissioners, and the holdings of each tenant were also stated to be under lease.

Subsequently to the purchase, a draft deed of attornment was prepared by the attorney of Thomas Booth, the purchaser, and sent to the bailiff of the purchased estates, in which draft the rent was stated in figures as reserved by the subsisting leases of the lands of Ballyobin; and the bailiff and tenants, with the knowledge and consent of the plaintiff, erased the rents as stated; and, with the like knowledge and consent, substituted the abated rents therein, and the defendant signed the schedule of said draft attornment by putting his mark opposite the description of his holding in such schedule, which draft was then returned to plaintiff's attorney; but said draft deed was not otherwise signed or executed, and no other deed of attornment had been drawn or executed by the defendant, or the other tenants of Ballyobin.

On the 28th of June 1854, plaintiff served a notice on the defendant, calling on him to pay in future, after the 1st of November next, the rent originally reserved by the lease, in lieu of the reduced rent; and in December 1854, the defendant paid to the plaintiff two quarters' rent, at the abated sum of £11. 7s. 4d., up to and for the 1st of May 1854, amounting to £5. 13s. 8d., for which plaintiff gave a receipt, reserving his right to claim the entire rent.

A summons and plaint against the defendant having issued, and been served for the year's rent due up to the 1st of May 1855, the proceedings in the action were stayed by consent and order of a Judge, and these questions were stated on the special case for the consideration of the Court:—

\* For Schedule see opposite page.

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SCHEDULE.

Denomination.	Tenant's Name.	Quantity of land, Statute measure.	Annual Rent.	Gale Days.	Tenure.
Lands of Ballyobin ...	Thomas Daly	A. B. P. 19 1 30 Irish Plantation measure 12 acres.	£ s. d. 11 7 4	1st February. 1st May. 1st August. 1st November.	Lease dated 1st Nov. 1810, from William Wallesey to Patrick Daly, for the life of Charles Bagot. The rent reserved by lease is £23. 19s., late Irish cur- rency, abated to the sum stated in rental, which includes tithes rentcharge.

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First—Whether the plaintiff is entitled to recover, out of the premises demised by the lease made on the 1st of November 1810, the full rent reserved thereby during the continuance of the term thereby granted, being the annual sum of £23. 19s. Irish, equal to £22. 2s. 2d. British?

Secondly—Whether the defendant is entitled to hold the premises demised by the lease of the 1st of November 1810, during the continuance of the term thereby granted, at the said abated rent of £11. 7s. 4d?

*Lawson and Hans Hamilton* (with them *Berkeley*), for the plaintiff.

The question arises on the conveyance from the Incumbered Estates Court, and the schedule thereto; whether the abatement of rent is a legal and binding abatement, or a temporary relief, authorising the landlord, at any time after having made it, to insist on the original rent? Does the statement in the schedule, that the rent was abated to the sum in the rental, of £11. 7s. 4d., make it binding against the purchaser, though up to that time it was not binding on the landlord? The schedule states the circumstance of the abatement, but the plaintiff shows that it was a mere temporary reduction. There is nothing to prove any agreement between the landlord and tenant to reduce the rent. The conveyance of the Incumbered Estates Court puts the purchaser in the same position as the landlord was before its execution. The 23rd section of the Act for the Sale of Incumbered Estates (12 and 13 Vic., c. 77) enacts, that where a sale shall be made, the Commissioners shall ascertain the tenancies of the occupying tenants, and of any lessees or under-lessees whose tenancies, leases or under-leases affect the land or lease, or part thereof to be sold, and may give such notice and make or cause to be made such inquiries as they shall think necessary for ascertaining and securing the rights of such tenants, lessees or under-lessees; and the occupying tenants, &c., shall produce all leases, under-leases and agreements in writing under which they occupy or claim to hold, &c.; “and “the sale shall be made subject to the tenancies, leases or under-

"leases ascertained as aforesaid, and subject to which the owner  
 "or incumbrancer, applying for a sale under this Act, shall be owner  
 "and incumbrancer, and such other of the tenancies, leases and  
 "under-leases, ascertained as aforesaid, as shall appear to the Com-  
 "missioners to have been granted *bona fide* by the owner or person  
 "in possession, or in receipt of the rents and profits, and subject  
 "to which it shall appear to the Commissioners the sale should be  
 "made, &c., and where the Commissioners think fit, be made subject  
 "to any leases, under-leases or tenancies, according to any general  
 "description, or subject to any condition concerning any leases,  
 "under-leases or tenancies, the nature of which shall not have been  
 "ascertained, or shall be disputed," &c. The plain intention of the  
 Act was thus to leave the purchaser in the same relation to the  
 tenants as existed hitherto between the tenant and his landlord.  
 Then the 27th section enacts, "That every such conveyance, executed  
 "as aforesaid by the Commissioners, upon the sale of land, shall  
 "be effectual to pass the fee-simple and inheritance of the land  
 "thereby expressed to be conveyed, subject to such tenancies, leases  
 "and under-leases as shall be expressed or referred to therein as  
 "aforesaid, and as hereinafter provided, discharged from all former  
 "and other estates, rights, titles, charges and incumbrances what-  
 "soever, of her Majesty, her heirs and successors, and of all other  
 "persons whomsoever; and every such conveyance or assignment,  
 "executed by the Commissioners, upon the sale of a lease in per-  
 "petuity or other lease, shall be effectual to pass the estate created  
 "or agreed to be created by such lease, and then remaining un-  
 "expired, subject to the rent and covenants annexed to the reversion  
 "expectant on the determination of such lease, and to such tenancies,  
 "leases and under-leases as shall be expressed or referred to in such  
 "conveyance or assignment; but save as aforesaid, and as hereinafter  
 "provided, discharged from all rights, titles, charges and incum-  
 "brances whatsoever affecting the leasehold estate or interest," &c.  
 That section also speaks of the sale being subject to the tenancies,  
 leases and sub-leases subsisting. In *Fitzgerald v. Lord Portarling-*  
*ton* (a), it was held that a bill would not lie, by a tenant against

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(a) 1 Jones, 431.



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a landlord, for the specific performance of a promise in writing, signed by him, to reduce the rent of premises demised by indenture, in consideration of previous expenditure on them, and a fall in the value of lands, though there had been an acceptance of the reduced rent for seven years.—[LEFROY, C. J. That case only decides that a temporary abatement will not bind the landlord.]

*J. E. Walsh and David Lynch, contra.*

The purchaser here bought the premises on a reduced rental.—[CRAMPTON, J. You have but to satisfy the Court that the schedule is in your favour; for our inquiry can only be, what have the Commissioners really done?—The schedule has no tenancy, except one under a lease; and how can this Court say that the abatement spoken of in the schedule was not made by a deed? The 21st section of the Incumbered Estates Act directs notices to be given to such persons, and in such manner, as the Commissioners think fit, when a sale is about to be had, and they are to investigate the title and incumbrances affecting the land or lease to be sold, and the state and circumstances of the land, and then, at their discretion, order a sale. The 23rd section directs the sale to be made subject to the tenancies, leases or under-leases ascertained as aforesaid; that is, as directed by the 21st section. The question here therefore is but one of construction of the conveyance of the Commissioners; and the obvious meaning of it is that they sold the premises in question subject to the abated rent only. It is stated in the conveyance—at least in the schedule, which is part and parcel of it—that the rent reserved by the lease is abated to the sum in the rental, and is so stated as if it were an abatement by deed.—[CRAMPTON, J. Have the Commissioners sold subject to an abated rent or not?—If the Commissioners have power to confirm a parol agreement to abate the rent, surely they may sell subject to the abated rent. The landlord has parted with the estate, subject to certain conditions. He might have prevented the sale, or had the schedule altered. The 24th section says, “Such conveyance or assignment shall express or refer to the tenancies, “leases and under-leases (if any) and charge (if any) subject to

“which the sale is made,” &c. The existing tenancies are all in the power of the Commissioners to deal with.—[LEFROY, C. J. That is not disputed; but, in the case of a yearly tenancy, some ambiguity might arise as to the determination of the tenancy, and the Commissioners may, therefore, require a specific statement as to that, to adjust the relation between the landlord and the tenant; but, in the case of a lease, no difficulty of that nature can arise, and no necessity, therefore, to adjust the relation.—MOORE, J. You read the words “tenancies, leases and under-leases” as though they were leases and rent.]

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*Hamilton* replied.

*Cur. ad. vult.*

PERRIN, J.

[After stating the facts, proceeded.]—Upon this state of facts, the question arises, whether the plaintiff was entitled to receive the annual sum of £23. 19s. in Irish currency during the continuance of the term in the lease, or was the defendant entitled to hold at the abated rent? The rental states that the tenant held at the annual rent of £11. 7s. 4d., and the rent in the lease was £23. 19s. Irish; and it appears that it was so received as an abated rent, and is stated in the schedule as the rent of the premises, including the tithe rentcharge. That rental was the act of the owner of the inheritance, the reversioner, who succeeded on the death of the lessor: it states that the tenant held at an abated rent, and the conveyance of the Commissioners grants the premises to the plaintiff, to hold subject to the tenancies and leases referred to in the schedule attached to this conveyance. The premises are not granted by the Commissioners subject to any particular rent, but they are granted subject to the lease; and in the observations made by the Commissioners, in the schedule, under the heading “tenure,” the premises are stated to be held under a lease, the rent reserved thereby being £23. 19s. Irish currency, abated to the sum stated in the rental. The true meaning of that is, the rent reserved by this lease is £23. 19s. Irish, but it has been abated to the sum stated in the rental, *i. e.*, £11. 7s. 4d. What has been abated? The

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rent payable during the term; not the rent for one or more gales, but the rent for the entire term, embracing all future rents. This appears the plain import of that absolute and unqualified statement in the schedule. The rent reserved is stated to be abated, not merely to the sum of £11. 7s. 4d., but to the sum stated in the rental—that rental (on which the lands were set up and sold) being the act and the language of the owner of the property sold, and not of the tenant of that property, and he therein states that the rent was abated. That is his unqualified declaration, and there is nothing in it to curtail the meaning and import of this statement, or to abridge the natural meaning of the words there used; there is nothing to show that the rent had been abated, either during the term, or for a certain number of gales of that term. On what ground then are we to assume that it was but a temporary abatement, or for a period that had past? In looking to the rental, we must consider its object, viz., to give precise and accurate information to all persons concerned, to enable them to ascertain the fair value of the property to be sold. It is published for the information of purchasers, to enable them to calculate precisely what they would give for the thing to be purchased. The seller declared the rent had been abated; the obvious result of that would be to reduce the amount of the purchase-money; and we must assume that he dealt fairly and openly, and that he stated fairly the value of the property he was setting up for sale.

The question is in fact nearly reduced to a matter of verbal criticism. Does the word “abate” import no more than a temporary act? To abate is to lower, lessen, diminish, reduce or depreciate; it signifies, in its proper sense, to diminish or take away. Now unless it has some peculiar meaning in the rental, of which I am unaware, I would say it means the rent in the lease is £23. 19s. Irish, reduced to the sum stated in the rental; and there is nothing to confine the effect of these words to by-gone rents, or any peculiar gale or gales, or to show that it was a mere temporary abatement; it is a statement absolute, unqualified and unconditional.

The heading of the schedule is worthy of consideration; it is

headed "tenure;" that does not merely mean a lease: tenure signifies the estate of the tenant in the land, the rent, the nature of the lease and other circumstances which may bear upon it, and it is not applicable to any technical notion of tenure. It is peculiarly important to observe the words used by the Legislature in the Act of Parliament; the word "tenure" is applicable to tenure in socage, which is defined by *Littleton* to be "where the tenant holdeth of his lord the tenancy by certain service for all manner of services, so that the service be not knight service:" *Lit.*, p. 117. That plainly shows that tenancy does not mean a mere technical tenure; but that it means and embraces the tenure or services or rent whereby the land is holden; the terms and conditions on which the land is holden, whether verbal or written.

It appears to me, from the plain statement and acts of the parties, that the lands were sold under the rental referred to in the schedule annexed to the conveyance; that it was a declaration of the vendor and owner of the estate of the reduction of the rent, and powerful evidence against him and the vendee. The basis of the purchase must be taken to be, amongst other matters, this statement in the rental; it is more than the ordinary statement by the owner, because it is made with the object of regulating the conduct of the purchaser and of the tenant also; it is not merely the case where, in proceeding in the ordinary course of dealing between the parties, the question would have been left to a jury, whence they might have inferred a surrender of the lease and the creation of a new tenancy at a reduced rent; but it is the case where all these matters had in due course been brought under the adjudication of a competent Court for investigation: and this Court cannot presume, after these facts have been so adjudicated on, that this rent had not been abated, especially after receipt of the reduced rent for a period of eighteen years prior to the sale.

It would have been competent for the owner to have stated either that there had been a covenant to accept the reduced rent, or a release of the surplus; and it appears to me, looking to the provisions of the 12 & 13 *Vic.*, c. 77, that it was the duty of the Commissioners of the Incumbered Estates Court to investigate all these matters, and to have ascertained, with as much precision

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as possible, the real facts of the case, the contents of the lease and the rights of the tenants. They are to see, generally, what the estate really is, and they are to sell with such precautions and under such circumstances as will secure the rights of the tenants. They are bound to issue notices, or call upon the parties to produce their leases or agreements, informing them of the particulars or conditions under which they occupy or claim to hold.

Looking then to the rental, which is undoubtedly the statement of the owner himself, he there states that he is the owner of the estate subject to the lease, the rent upon which has been abated. It is not stated whether there was a surrender or agreement for reducing the rent; but the lease is produced, and the owner states that it is part of the terms that the rent should be abated. If he had produced an agreement or a release of the excess, could it have a greater effect than the declaration of the party, under such circumstances? If in this case the mis-statement had been the other way, and the land had been sold subject to £23 instead of £11, it appears, by the decisions of the Incumbered Estates Court, that the sale would be set aside, or money would be applied to relief of the purchaser: so that, by the technical rules of the Court, as well as the reason of the thing, the statement in the rental is held to be an essential part of the transaction, and the basis of the proceeding. That rule cannot apply one way, and not another.

It appears plainly from the Act of Parliament, that the Commissioners are not to act merely as auctioneers; but they are to take care such a light shall be thrown upon the transaction, so that the truth shall appear, for the benefit of every person connected with the land, as well owner as incumbrancer. It must be presumed that the Commissioners have done their duty, and that they do make inquiries whether the matters stated be correct, exact and true; they are not alone to refer to the lease, but they are to inquire extra and beyond it, not alone from written documents, but from parol statements and usage, and from the acts and course of the estate, and to see that no ground for dispute should remain. I consider that a jury would be bound to presume the necessary existence of this abatement, and either that there

was a covenant not to sue, or a release of the surplus; and the Judge would be bound to ask the jury whether they did not believe that such instrument had been executed between the parties; and if the Judge had declined so to do, it is clear, from the case of *Lefroy v. Walsh* (a), the verdict could not stand.

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I, therefore, would rule the first question in the negative, and the second in the affirmative.

CRAMPTON, J.

This case appears to me to involve nothing more than the interpretation of a document, nothing different from a document between seller and purchaser, of a private character; at the same time, it comes before the Court in a different manner, perhaps more favourable to the purchaser.

The question is, what is the effect of this conveyance by the Commissioners of Incumbered Estates? The 27th section of 12 and 13 Vic., c. 77, tells us what that is. It is precisely equivalent to a conveyance made out by parties in whom the title is vested. The rental is, no doubt, a very important part of the proceedings of the Commissioners, but I doubt very much the accuracy of the statement that it is the assertion of the owner of the estate. The rental is prepared by the party having the carriage of the sale, and when prepared it is subject to every objection that can be made to it by persons interested, and when ratified by the Commissioners it becomes the rental by which the property is to be sold: if it be the assertion of the seller whose estate is sold against his will, on the one hand, it is, on the other hand, the assertion of the tenant. The 49th section is explicit on that point; and this Court are bound to presume that everything has been done by the Commissioners which they were bound to do, when they executed the conveyance. The rental is the declaration as much of one party as the other, nay, it is more the declaration of the tenant, for the Commissioners are bound to investigate the title of the tenant; a notice is to be served on him, and he is called on to state any objection he may have, and if he make any objection his title is discussed; and

(a) 1 Ir. Com. Law Rep. 311.

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the rental is made out so as to be as true a representation of the property as the Commissioners were able to make out; and accordingly, we find the rules of the Commissioners so framed that due information should be given to the public, and nothing should be stated on the rental calculated to mislead. The sale takes place, and the property is sold subject to this lease, and of course all the covenants contained in it. I assume that the Commissioners acted with perfect propriety; they stated the rental in the schedule attached to the conveyance; they represented fairly everything that came within their knowledge. It appears that there was a lease outstanding, on which the landlord had received an abated rent, and the Master in the cause instituted in the Court of Chancery, in reference to these lands, continued to receive this abated rent, and further reduced it. That abated rent was received voluntarily by the landlord for several years after resuming possession, but that cannot afford a ground for presuming a surrender. It would be dangerous to maintain such a proposition. If the terms of the abatement were not reduced to writing, the abatement can but be regarded as temporary. Further, this reduced abatement was made by order of the Court of Chancery, and it has never been held that such would bind the landlord when he resumed the possession. How could this statement create a right in the Commissioners to sell subject to the abated rent? The Act of Parliament is against that view, for it says, the Commissioners shall sell subject to the tenancies and leases. Tenancies are used in contraposition to leases, and mean tenancies from year to year, not held under leases: here there were no tenancies. The Commissioners would have been bound to put in the abated rent, if the tenant had produced a new lease, or anything under seal to show that abatement, but without that it could not be cut down. The schedule does not state that the abatement was done by any act which would affect the reversion; there is nothing like a statement of a perpetual reduction, and the original contract, being by deed, could only be dissolved *eo ligamine quo ligatur*. By law it was only a temporary reduction. I therefore am of opinion that the plaintiff is entitled to recover the original rent reserved by this lease.

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This is a special case, raising a question that originated in an action brought by a landlord against his tenant, suing him for a certain rent reserved by a lease executed under the hand and seal of the tenant; and the answer of the tenant is not a release of the rent, nor a covenant or agreement to abate the rent, nor any legal principle that could be an answer in a Court of Law to the action brought on this lease.

It is not disputed that the plaintiff was assignee of the reversion incident to which the rent was attached, for the conveyance passed the reversion subject to the lease; and so the assignee of that reversion became entitled to the rent reserved by that lease. It is true, and I will take it in the strongest way, that this abatement was made by a note in writing, under the hand of the former owner of the lands, that they were held at an abated rent; but there is no authority, to show that such a note in writing could be an answer to an action of debt or covenant, or an ejectment brought on that lease. If the tenant had shown any legal instrument which would be an answer to the action, he ought to have the benefit of it; but I do not find any such thing on the face of this special case; the utmost I can find is a statement, taking it in a most favourable way for the tenant, which amounts to this, that the former owner stated that the rent had been abated: that is no answer to this action. The right of the assignee is founded on the legal assignment executed by a person whose act is equivalent to the act of the reversioner himself; and looking to the act of the Commissioners, it is as valid and efficacious as the act of the reversioner himself.

But it is said that, because the reversioner gave a written note, this statement of that by the Commissioners is an answer to the action. Is there then anything in what has been done by the Commissioners that can give effect to this note, and give it legal effect and operation, as an answer to this proceeding to recover the rent under this lease? If this statement of the Commissioners had the effect of making a reduction in point of law, if they intended to sell, and the purchaser to buy, an abated rent, do the documents



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show that? If they intended to do so, why state so accurately a lease reserving a higher rent? If they intended to sell subject only to the abated rent, they might have so stated; but I am at a loss to find any jurisdiction giving them power to take upon themselves to decide a question between landlord and tenant, of a dubious character; they have nothing to do but state the true condition of the property, and apprise the purchaser fairly upon what terms he purchases, that he may know there is a lease giving him a legal title to a rent, but that there may be an equitable title to reduce that rent, that an abated rent had been received: and they give the purchaser notice of that abatement, reserving to the tenant the right to that abatement if he be entitled to it. A mere temporary abatement will not deprive the owner of the estate, or his creditors who may be selling it, of the right to the larger rent.

But it has been contended that this sale was subject to the abated rent. I have inquired what the practice of the Commissioners is, and I have been informed that they never contemplated any such thing; they merely desired to record the lease, and the fact that there had been an abatement, and to saddle the purchaser with notice of the fact, and to reserve to the tenant the benefit of that fact, if he could show he was entitled to the abatement.

I have no doubt that, on the documents before the Court, and the words "abated rent" taken along with them, no answer is given to an action by the assignee against the tenant for the rent reserved by the lease. Behind the record there may be facts to modify the opinion, but there is nothing before the Court furnishing a legal answer to the action: the words "abated rent" appearing in the schedule or rental cannot nullify or cancel the lease. If they had the effect of reducing the rent, what remedy would be left to the assignee for the reduced rent?

In my judgment, the plaintiff is entitled to the full rent reserved by the lease.

CRAMPTON, J.

I am authorised by Judge MOORE to state, that he concurs in opinion with the LORD CHIEF JUSTICE and myself.

Judgment for plaintiff.

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## DENIS MAHONY

v.

ANNE LEVIS, Executrix of SAMUEL LEVIS.

Continued in the name of BELINDA MAHONY and others,  
 Executors of DENIS MAHONY, *Plaintiffs*;  
 ANNE LEVIS, *Defendant*.\*

April 16, 17,  
 19.

**Use and occupation.**—The summons and plaint claimed a sum of £219, on account of money payable by Samuel Levis, in his lifetime, to the plaintiff, for the use and occupation, by the plaintiff's permission, from the 1st of May 1849, to the 1st of November 1852, of certain lands in the county of Cork. The particulars indorsed on the summons and plaint made a claim for the use and occupation of the premises for three years and a-half, and gave credit for a sum received in May 1849, on account, from Samuel Levis.

To this the defendant pleaded that Samuel Levis did not use and occupy the lands in manner and form in plaint mentioned.

After this plea had been filed, a suggestion was entered, stating the death of the plaintiff Denis Mahony, and the appointment of Belinda Mahony and others as his personal representatives.†

exercised no control over the land; the rent having been paid by B's family up to its expiration in 1849. B died in 1848, and his family remained in occupation for three years and a-half after his death. Receipts for the rent were passed in A's name up to 1848, when a sum of £65 was paid by A. In 1851, a writ issued against A, for arrear of this rent. To this action, A took defence, denying his liability; and subsequently, by agreement, a sum was paid on account. A was not then in occupation, and directed the agent of the landlord to take possession.—*Held*, that no action was maintainable against the representatives of A, for occupation of the premises after the expiration of the lease, and that on this evidence the Judge ought not to direct a verdict for the plaintiff, and that it was no misdirection leaving a question to the jury whether A had assented to such overholding.—[CRAMPTON, J., *dissentiente*.]

Where, after defence filed, the plaintiff dies, the action may be continued by his personal representative by entry of a suggestion; liberty to file such suggestion is granted on an *ex parte* application.

\* PERRIN, J., *absente*.

† **NOTE.**—This order was obtained under the 157th section of the Common Law Procedure Act, on an *ex parte* application, and the proceedings are continued in the name of such representatives, and so entered in the margin of the record as above.

By lease, bearing date the 11th of November 1818, certain premises were demised to A and B as joint tenants, for a term of thirty-one years. A became a party to this lease as security for B, who cultivated the lands until 1831, when a deed of partition was executed, and A gave his moiety to the eldest son of B, and from that period A

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The following issues were raised on these pleadings:—First, whether the persons named in the suggestion are the executrix and executors of Denis Mahony, deceased?

Secondly, whether the said Samuel Levis, in his lifetime, did use or occupy the lands in manner and form as in the summons and plaint stated?

The case was tried before the LORD CHIEF JUSTICE, at the Sittings after Michaelmas Term 1855. It appeared from the evidence that, by lease, of the 11th of November 1818, Lord Riversdale and others demised to Samuel Levis and John Woolfe the premises in question, as then and for some time past in the occupation of Samuel Levis and John Woolfe—*Habendum* to them, their executors, &c., for a term of thirty-one years, subject to the yearly rent of £65. That Levis became a party to this lease as security for Woolfe; that Woolfe cultivated the lands for some years, until by a deed of partition, of the 25th of February 1831, the lands were divided, and Samuel Levis gave his moiety to William Woolfe, the eldest son of John Woolfe; and from that period to the time of his death he never exercised any right over the lands, the rent having been paid up to May 1849, when the lease expired, by Woolfe's family. It further appeared that the interest of the Riversdale family in the lands was only for a term of years, and that it was conveyed to Daniel and Gerard Callaghan, who mortgaged their interest, and the mortgagee and the Callaghans assigned to the plaintiff, and that a receiver was appointed over these lands by the Court of Chancery, in a cause of *Callaghan v. Callaghan*. John Woolfe died in 1848, but his family remained in occupation of the land for three years and a-half after his death, and after the expiration of the lease. The agent of the mortgagees proved that for ten years he had received the rent from Levis, and had passed receipts in his name up to 1848, when the receiver was appointed. He deposed that, in May 1848, he received £65. 2s., paid by Levis, through his nephew Woolfe, the son of the lessee, and that the last payment was made in 1851. Previously to this payment, a writ of summons issued at the suit of D. F. Mahony against Levis, indorsed for a sum of £199; but Levis,

having taken defence, denied his liability, and notified to the receiver that he had no further possession of, or interest in, the lands. The receiver ultimately agreed to receive the money by instalments; and on the 2nd of May 1851, a sum of £100 was paid by a son of Woolfe's to the receiver.

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It further appeared that Levis had told the receiver to go and take possession of the lands. That at the time the lease had expired, Levis was not in actual occupation of the lands; but two of his sisters were in possession of part.

The defendant produced two witnesses, John Woolfe and the son of Levis, to prove that Levis never was in occupation, and that no rent was received from the tenants for Levis.

On the close of the case, plaintiffs' Counsel called for a direction, on the ground that Samuel Levis, the surviving lessee of the lease, having permitted the occupation of the lands, after the expiration of the lease, to remain as it was, without any attempt on his part to put the occupiers out of possession, became liable for the occupation during the time for which the action was brought. This the learned Judge refused to do, but reserved liberty for the plaintiff to have a verdict entered for him, if the Court should be of opinion he should so have directed.

The CHIEF JUSTICE then charged the jury, and left to them, as a question of fact, whether Samuel Levis had made himself liable, by any arrangement, for rent after the expiration of the lease? but that in order to make him so liable, as a continuing tenant, the jury should be satisfied that he agreed to overhold the lands as tenant, after the expiration of the lease. And he also left to them the question whether, by payment of the £100 and the receipt, he had recognised the tenancy? and that they should consider whether the £100 included anything beyond the sum due for rent on the lease? and that they should consider whether the payment of the £100 was a contrivance, or a *bona fide* payment?

The plaintiffs' Counsel then insisted that the CHIEF JUSTICE should have told the jury, that if, after the determination of the lease of 1818, the same parties continued to occupy the lands,

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with Samuel Levis' knowledge, and without any attempt on his part to put them out, he became liable for the occupation of the lands. That his Lordship, instead of leaving to the jury the question, whether the agreement or promise by Levis to pay £100, as stated by the receiver, included anything for occupation beyond the expiration of the lease of 1818, should have told the jury, if they believed the receiver's evidence, the sum of £199, indorsed on the writ, included a claim for a period beyond the expiration of the lease, and that Levis became liable for the use and occupation for the period covered by the £199.

Thirdly, they insisted that he should have told the jury that, as Samuel Levis, by the payment of the £100, and by not repudiating his receipt during his lifetime, induced the receiver to suppose he had adopted the tenancy of the parties in occupation, and prevented him from treating them as tenants of Mahony, at all events, for the period for which the sum of £199 was claimed in the action, plaintiff was entitled to a verdict.

The jury found for the defendant. A conditional order having been obtained, to set aside this verdict and to enter a verdict for the plaintiff, pursuant to leave reserved, or for a new trial, on the ground of misdirection—

*Sullivan* and *Macdonogh*, for the defendant, showed cause.

The conditional order is taken for misdirection of the Judge, and therefore no question arises on the evidence. The point is a narrow one, and has been the subject of decision: *Nation v. Tozer* (a). Where one of the two executors of a deceased tenant for years entered into the premises, such entry was held not to enure as the entry of both, so as to make them both liable for use and occupation. Parke, B., there says:—"Such enjoyment is not by law the possession "and enjoyment by both, and it does not render both chargeable to "the lessor to pay a compensation to him for it, as joint occupiers in "their own right. But in order to support this action for use and "occupation, it is necessary that the land should have been occupied "by the defendant, his agents or undertenants, during the time for

(a) 1 Cr., M. & Ros. 172.

“which the compensation is claimed for use and occupation.” This case cannot be argued as one of sub-tenancy, it is a case of co-tenancy. The lease was made to Levis and Woolfe; and though Levis was but a surety, he was equally liable as the principal; but he never lived on the lands, nor paid any rent out of his own money. It was in evidence that the money paid belonged to the Woolfes. No case of sub-tenancy was made at the trial. *Draper v. Crofts and Bartlett* (a) rules the case. That was a demise to A and B for a term, and B held over after the expiration of the term, without A’s assent; and it was held that A was not liable for rent becoming due during such holding over: and so *Tancred v. Christy* (b) decides that one tenant cannot bind his co-tenant merely by holding over; and in *Woodfall’s L. and T.*, p. 523 (7th ed.), referring to this case, it is said:—“In a second action for subsequent use and occupation “of the same premises, it was held that if premises are let to two “persons for a term, at the end of which one holds over, with the “assent of the other, both continue liable for the time the one “actually occupies; but both will not be liable, if the holding “over has been without such assent.” It is therefore plain that the CHIEF JUSTICE should not have directed the jury to find a verdict for the plaintiff.—[CRAMPTON, J. Unless the plaintiff can stand on the abstract question, he has no *locus* here.]—We do not argue against the weight of evidence. The jury have found against both actual and constructive possession in Levis, and yet the Court are called on to set aside the finding, because of misdirection: *Woodcock v. Ruth* (c).

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*Lane and Exham*, contra.

We called on the Judge to direct the jury that the possession of Levis was deducible from the facts proved, his telling the receiver to go and take possession, and other circumstances, which led to the inference that the holding was by Levis himself, and the other parties under him. He paid the rent, and the possession was in him as lessee; we never recognised the sub-tenants.—

(a) 15 M. & W. 166.

(b) 12 M. & W. 316.

(c) 8 Bing. 170.

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[CRAMPTON, J. You did not object to the issues sent to the jury; nor did you object to the findings.—LEFROY, C. J. The abstract question is, whether a continuance in possession by one co-tenant is the possession of the other?—MOORE, J. Are not the findings of the jury tantamount to a disclaimer by Levis?—] If that be so, then the doctrine laid down by Lord Abinger, in *Christy v. Tancred*, is not law: *Ibbs v. Richardson* (a). That was a case where the under-tenant held over, against the will of the leasees; and the latter were still held liable in an action for use and occupation, on the ground that the undertenants' possession, being obtained by and through the defendants, was to be taken as their possession up to the expiration of the lease. The Woolfes must be taken to have been in occupation by consent of the lessee; and until that assent be determined, the defendant remained liable. In May 1849, the Woolfes were in possession, by and through the instrumentality of Levis; and he, being the surviving lessee, was bound to deliver up possession to the landlord, before his liability determined. *Christy v. Tancred* (b) was an action for use and occupation, against several defendants, who were the original parties to an agreement to take premises of the plaintiff for one year; and it was proved that, after the termination of the year, some of them had continued in actual possession; and the action was brought against all, to recover rent accruing due during the period of holding over. Parke, B., says, in 7 *M. & W.*, p. 129:—"If some "of the defendants had continued to occupy, they would all have "remained liable. It is their duty, at the end of the term, to "give up the tenancy; if, by themselves, or by sub-tenants or "joint-tenants, they remain in, they are liable as holding over." That case came again before the Court of Exchequer, in 9 *M. & W.* (p. 438); and it was urged, on behalf of the defendant Tancred, who was not shown to have actually occupied during the period of holding over, for which the rent was sought to be recovered, that though there might be an action on the covenant against all, the landlord would only treat those who remained in as trespassers or tenants; and the difference between a co-

(a) 9 A. & E. 849.

(b) 7 M. & W. 127; S. C., 9 M. & W. 438.

tenant and undertenant was insisted on; the one comes in under the tenant, the co-tenant under the landlord; and that a party has no control over his co-tenants, who may continue to occupy against his will. But the case was ultimately decided on the ground that there was evidence of Tancred's assent to the continuance in possession of the other defendants. The case in 7 *M. & W.* decides that the defendant is liable; the case in 9 *M. & W.* decides that, where assent is shown, the joint tenant not actually occupying is liable: *Harding v. Crethorn* (a) was a case where, the lease having expired, it was held that the tenant continued liable to the rent, unless he delivered up complete possession of the premises, or the landlord accepted another in his room; and Lord Kenyon there said:—"Where a lease is expired, the tenant's responsibility is not at an end; for if the premises are in possession of an undertenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term. But it may be proved that the lessor had accepted the undertenant as his tenant, as by his having accepted the key from the original lessee, while the undertenant was in possession, by his acceptance of rent from him, or by some act tantamount to it."

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*Cur. ad. vult.*

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MOORE, J.

This case comes before the Court on an application to set aside a verdict, on the ground of alleged misdirection.—[His Lordship, having stated the facts, proceeded to say]:—It is plain that if a tenant, himself being in possession, should overhold, an action for use and occupation may be maintained against him at the suit of the landlord. It is also plain that, if the tenant underlet, he himself not being in possession, and his tenant overhold, in like manner he is liable in use and occupation. That principle was so laid down by Lord Kenyon, in *Harding v. Crethorn*, the ground of that decision being that the occupation by the under-

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(a) 1 Esp. 56.



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tenant was the same as the occupation by the tenant himself. I would be inclined to go further, and say that, if a tenant put another into possession, use and occupation might be maintained against him, the possession of the man to whom he gave it being looked on as his own possession. But the present case does not fall within those cases. Levis never was himself in possession; he never overheld the possession; and it cannot be said that the overholding by Woolfe's family was through Levis.

This case comes within the principle of *Draper v. Crofts and Bartlett (a)*. That was *assumpsit* for use and occupation; one defendant pleaded *non-assumpsit* and payment; the other defendant (Bartlett) suffered judgment by default. It appeared the plaintiff had let the premises to the two defendants, by a written agreement, for three years; Bartlett alone occupied and paid the rent, and held over after the expiration of the three years. There was no evidence of any assent by the other defendant to this holding over; and the only evidence of his knowledge of it was a letter demanding the rent, written by plaintiff's attorney, to which he made no reply; this letter was received in evidence, and the Judge left it to the jury to say whether this defendant had assented to Bartlett's holding over the premises? The jury found for the plaintiff, that this defendant did assent; but the Court set aside the verdict, on the ground of its being entirely unwarranted by the evidence. It appears to me, on the authority of that case, that if Woolfe had survived to the end of the term, and overheld, no action could be maintained against Levis, unless he assented to that overholding. This same principle is applicable to the parties who got the possession from Woolfe, without the assent of Levis; and accordingly, the CHIEF JUSTICE, considering it a question for the jury, left it to them; and they found for the defendant.

It is now said that no question ought to have been left to the jury. No doubt, a great deal of evidence was given to show the assent of Levis, and a great deal of evidence the other way; and if the conditional order had been taken to set aside the verdict as being

(a) 15 M. & W. 166.

against the weight of evidence, that point might have been open; but it is not on that ground the conditional order was taken.

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It appears to me that the CHIEF JUSTICE took the proper course in leaving the question to the jury, and therefore that the verdict ought to stand.

CRAMPTON, J.

This case involves a very important question upon the law of landlord and tenant; and, upon the best opinion I can form, I think that the verdict ought not to stand. The only ground relied on to set this verdict aside is one of misdirection; but I conceive, even on the issue sent to the jury, the verdict ought to be set aside.

The facts of the case are few. Woolfe and Levis were in possession under a lease made to them jointly as joint tenants; that lease expired on the 1st of May 1849. Woolfe died in January 1848, and his widow and son continued in possession of the premises. It appears that Levis had no actual, that is, personal, possession at any time, although he would be as liable on a constructive possession as an actual one; Woolfe alone enjoyed the profits of the farm, but Levis paid the rent, and it was in his name the receipts were given by the receiver. However, on Woolfe's death in 1848, his widow and son remained in possession, and it has been assumed that they got the possession from Woolfe; but that is an erroneous view. They never were tenants during the existence of the lease, save as members of Woolfe's family, occupying just as his servants occupied. It is true they were in possession after his death; but how did they get that possession? What were the rights of the parties at that period? The landlord was entitled to his rent during the subsistence of the lease; Levis was entitled to the possession of the whole, and bound to pay the rent on the death of his co-lessee; he then became sole lessee of the premises, just as much as if the lease had been made to him individually. He did not turn out Mrs. Woolfe and her son, but allowed them to remain in possession, and to receive the rents and profits of the premises. There is no evidence of what the dealings were between Levis and the Woolfes; there is some evidence of money having been

E. T. 1856. paid by Levis on the part of the Woolfes; but I take it to be an incontrovertible proposition that both mother and son, on the day of the expiration of the lease, were tenants by the permission of Levis; he paid the last gale of rent up to 1849. There is also a remarkable transaction that took place subsequently, in 1851, two years after the expiration of the lease. A new receiver, having come into receipt of the rents, issued a writ against Levis for the rent due; he is applied to for the possession, and he says "go and take it." The rent is then paid, and two receipts are passed by the receiver, one of which exactly clears off the rent due under the lease, to the year 1849; the other is for small sums on account of rent and costs, but the only rent that could be then due was for rent after 1849. The origin then of Mrs. Woolfe's possession is owing to and by the man alone entitled to that possession, viz., Levis; the receiver or the head landlord never had any dealings with Mrs. Woolfe or her son. There was no case of a new tenancy created, or of any agreement by which the landlord assented to the possession of Mrs. Woolfe; are we not then bound to assume that Mrs. Woolfe was in possession by permission of Levis?

I think the difference between the Members of the Court arises rather in the application of the facts than of the law. The law is stated by Parke, B., in *Christy v. Tancred* (a). He says:—"It is clear that the original parties to this agreement continued liable for the rents as tenants holding over, unless there was a new agreement by the landlord to accept other persons as his tenants in their stead. The only question therefore is, whether there was in this case any evidence of an agreement by the plaintiff to accept the new parties as tenants in place of the old?" There was no such agreement here; the possession was not given up at the expiration of the lease; and Mrs. Woolfe, remaining in possession under a particular title, continues in that possession under that title until another be shown. She and her son were permissive tenants, and their title can only be traced to Levis. The word "undertenant" is used by Lord Kenyon in that case (5 *Exp.*, p. 56). He says:—"If the premises are in possession of an undertenant, the

(a) 7 M. & W. 130.

“landlord may refuse to accept the possession, and hold the original lessee liable; but it may be proved that the lessor had accepted the undertenant as his tenant, as by his having accepted the key from the original lessee, while the undertenant was in possession, by his acceptance of rent from him, or by some act tantamount to it.” He does not advert to its application to a person who pays rent to the tenant; and it is remarkable, in *Christy v. Tancred*, that the defendants were not undertenants, but persons who suffered others in the same interest to remain in possession; and it was held they still continued liable. The rule so laid down by Lord Kenyon is not questioned in the case of *Christy v. Tancred* (a), though in the first case the Court went too far. Both these cases were re-considered by the Court, in *Draper v. Crofts and Bartlett* (b); and the Court there held that where there is a demise to two for a term, and one holds over after the expiration of the term, without the other’s assent, that other is not liable for rent becoming due during such holding over. That is an exception which, I take it, is well founded in reason and good sense. Where there is a single tenant, and persons are in possession by his permission, he can turn them out, but a co-tenant not in actual possession is without remedy against his co-tenant; he cannot turn him out, and is placed in a position of great difficulty: but that is an excepted case. The doctrine of that case in 15 *M. & W.*, p. 166, cannot apply here, because in this case one of the co-lessees died before the expiration of the lease, and the remaining one was alone liable. The landlord could not maintain an action against Mrs. Woolfe and her son, because there was no contract between them; they must be considered tenants by sufferance.

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Then the question resolves itself into this, does the present case come within the rule or the exception? It is said to be within the exception, because Mrs. Woolfe and her son acquired possession under Woolfe; but they could not acquire that from a person whose title expired on his death, and Levis acknowledged himself the sole person responsible for the rent both before and after the determination of the lease. Actual occupation is not necessary, to render

(a) 9 *M. & W.* 438.

(b) 15 *M. & W.* 166.

E. T. 1856. a person liable for rent ; if he occupy by an undertenant, or by  
*Queen's Bench* permitting persons to remain in possession with his sanction, he  
 is considered as being in possession, so far as to charge him with the  
 rent ; and therefore I consider Levis answerable for this rent.

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The question raised was brought before the LORD CHIEF JUSTICE at the end of the evidence. The issues were sent to the jury without objection ; and I think the question raised was one of law, for his Lordship, and not for the jury, and therefore required a direction. The presumption of law is, that where a single tenant does not yield up possession on the expiration of a lease, he remains liable for the rent ; and though there be other persons in possession, deriving through him, whether paying rent or not, he still continues liable. No evidence appears to me to have been given to rebut that presumption, and therefore, though I distrust my own judgment, I think there ought to be a new trial.

LEFROY, C. J.

I have the misfortune to differ in this case from my Brother CRAMPTON, both as to the law and the consequences resulting from it. If the law be that a party continuing in possession by sufferance or by the permission of the tenant, that that makes the tenant liable for the rent, surely there is still a question for the jury, whether the party remained in possession by the permission and sufferance of the tenant ? and therefore I was quite right in leaving to the jury whether Mrs. Woolfe was in possession by the permission of Levis ? The responsibility of a tenant overholding is a responsibility arising from continued occupation, not from any of the obligations in the lease, further than their specifying the rent, or the terms on which the responsibility of the tenant, after the expiration of the lease, arises. I agree that if a tenant, after the determination of the lease, continue to occupy *de facto*, he is liable in use and occupation ; and I also admit that if the tenant, instead of occupying the premises himself, keep possession by an undertenant, whom he allowed to go into possession, he is still liable ; for *qui facit per alium facit per se* : and if he continue to receive rent from the undertenant, he must of course be responsible. He is

liable, not merely for the occupation of undertenants, but for the occupation of any person who may have got into possession of the lands through or by his instrumentality. Occupation by himself was the old principle of law ; occupation by an undertenant, or by any one brought into possession through his instrumentality, is added to the old liability. I entirely agree with the doctrine laid down by Lord Kenyon, in *Harding v. Crethorn*, that the landlord is entitled to treat a lessee who has not given up possession as still occupying by persons who came into that possession through the instrumentality of the lessee. That case rested on the principle that the person by whose means a person is brought into possession is liable for the rent ; but that case also establishes that the question by whose means or instrumentality a person comes into possession, or by whose assent he has continued in possession, is a question to be left to the jury. A tenant is not liable as an overholding tenant if he did not *de facto* overhold, unless he overheld by the person introduced through his instrumentality ; and whether he assented to that possession, or introduced the party, is a question of fact for the jury, and I left it to them accordingly.

The second issue was, did Levis assent to the possession of the Woolfes ? How did Levis, by any act of his, indicate any assent to the continuance of the possession by them as his undertenants ? Was it by his consent, sufferance or permission ? To bring Levis within the rule as to liability, we must consider whether the law is as I have stated, that his instrumentality must be established before the liability arises, and that his mere permission is not enough to render him liable in use and occupation, until the jury find the fact of his assent. If it appear, by legal documents, that a tenant in possession has made an under-lease, and the lease is produced, the Judge has but to construe the legal documents, and direct the jury that the person who executed that under-lease is the person liable for the rent. No such evidence was produced here—nothing of the sort, save the fact that Mrs. Woolfe and her son were *de facto* in possession. How they came into possession—whether there was a lease from Woolfe to his son, whether there was a lease made to trustees for the benefit

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of Mrs. Woolfe and her son, whether they were tenants from year to year, there was no evidence. The original lease was made to Woolfe and Levis. Woolfe might have made a lease for five, ten or fifteen years, and that would have ended the right of survivorship. But without any evidence as to the manner in which Woolfe's family remained in possession, it is said that Levis is to be charged, after the expiration of the term in the lease, as occupying tenant, because of the possession of another person. There is no case in the books authorising the proposition that a surviving joint tenant is liable for a holding over, simply because some person has come in generally, not through or under him, or by his instrumentality, but by and through another person. Mrs. Woolfe and her son came in through Woolfe, not through Levis: he was possessed *per my* and *per tout*: and there is this further peculiarity—this was a case of a non-occupying joint tenant; Levis never occupied during the term of thirty years, never received one shilling of rent; and yet we are called on to extend the law against a non-occupying tenant, to render him liable for rent, he not occupying either during the lease or after its determination, the party in possession not being in either through his instrumentality or procurement; and this because it is said he might have turned them out. How could a man who had not been in actual possession (I admit he paid rent under the lease) treat these persons as trespassers?—could he have given them notice to quit? What relation of landlord and tenant existed between Woolfe's family and Levis? None that I can discover. It would be throwing on a surviving lessee, he not assenting to the possession of the premises by the immediate occupiers, a liability for which he should not be responsible. To say that the naked fact of the co-lessee dying, and leaving his family in possession, should make the other *de jure* liable, is not authorized by law; but even if it were a presumption of law, that presumption may be rebutted. It was not to be left to the jury to rebut it. I say nothing about the evidence, whether strong or weak, to rebut it; but for the jury, I may say, I was quite satisfied with their finding. I know of no principle of law which establishes the li-

bility of a surviving non-occupying lessee, he not having any means of exercising his right by survivorship, for the occupation of persons coming in not through his instrumentality.

As to the verdict being against the weight of evidence—on that point the Court would be unanimous against the plaintiff; and on the point raised, I confess I think there was no ground for directing the jury: and as no complaint was made as to the terms on which the issues were sent to the jury, I am of opinion that the cause shown should be allowed, and with costs.

Judgment for defendant.

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THE summons and plaint contained two paragraphs, one for breaking and entering the close of the plaintiff. The second paragraph claimed damages, because Patrick Murphy, in his lifetime, on, &c., broke and entered a dwelling-house of the plaintiff, made a great noise and continued therein for two days, and took divers goods of the plaintiff, and carried away and converted same to his own use. The summons and plaint then averred that Patrick Murphy died on the 25th of November 1855, and that probate of his will was granted to the defendant.

Defence, as to the breaking and entering the dwelling-house, and taking the goods and chattels of the plaintiff and converting them to his own use as alleged; that Patrick Murphy did not on the said day commit the several trespasses in the second paragraph alleged; but that, on the 5th of October 1855, the plaintiff being tenant to Patrick Murphy, in his lifetime, of certain premises, at a weekly rent, a sum of £1. 8s., for thirteen weeks' rent of said

To an action of trespass, for breaking and entering the close of the plaintiff, and seizing and taking and carrying away and converting the goods and chattels of the plaintiff, the defendant pleaded a justification;—because of an arrear of rent being due by the plaintiff to the defendant as his landlord, he, the defendant, entered and distrained the goods and chattels as and for a distress for the rent due, "accord-

ing to the form of the statute in such case made and provided;" *quæ sunt eadem*, &c. Held, on demurrer to this defence, *per* LEFROY, C. J., and PERRIN, J., that such general pleading was good; and *per* CRAMPTON and MOORE, JJ., that the requirements of the statute 9 & 10 Vic., c. 111, should have been specifically set out in the defence.



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premises, was due to Patrick Murphy, and in arrear on the 29th of September 1855; and that thereupon, Patrick Murphy, in his own right, did, by his bailiffs, on the 5th of October 1855, enter upon said premises, and distrain said goods, in the second paragraph of the summons and plaint, as and for a distress for said rent so in arrear, according to the form of the statute; *que sunt eadem*, &c.

Demurrer to this defence, assigning as cause, that it did not state or show that, at the time of the making of the distress, a particular in writing of the rent demanded, specifying the amount thereof, the time and times when same accrued, and the name and place of abode of the person by whom the distress was made, was delivered to the person in possession of the premises, or affixed on some conspicuous part of the premises; and because it did not state or show that any person was in possession of the premises at the time the distress was made and that a particular in writing of the rent demanded, as required by the statute, was given to any such person, or affixed on any conspicuous part of the premises.

*Coates*, for the demurrer.

This defence does not state on the face of it, or show, that the party making the distress which is justified served the statutable notice required by 9 & 10 *Vic.*, c. 111, which by the 10th section enacts:—"That in all cases of distress for rent, cognisable in any Court, whether Superior or Inferior, the person making any such distress shall, at the time of making such distress, deliver to the person in possession of the premises for the rent of which such distress shall be made, or, in case there shall not be any person found in possession, shall affix on some conspicuous part of such premises a particular in writing of the rent demanded, specifying the amount thereof, the time or times when the same accrued, and the name and place of abode of the person by whom, and (if the person who acts in the making of the distress be not the party claiming to be entitled to the rent for which the distress is made) the name of the person by whose

“ authority such distress is made, or otherwise such distress shall be  
 “ unlawful and void.” No notice or particular in writing of any  
 kind is averred to have been served; there is only the inferential  
 statement that the distress was made according to the form of the  
 statute in such case made and provided. It lay on the defendant,  
 justifying a breaking and entering of plaintiff's close, to set out the  
 statutable requirements for that justification; he was pleading a  
 statute, and should have shown the specific provisions on which he  
 relied. *Madden v. Bryan* (a) has ruled the very point; for it  
 decided that a plea was bad, for not showing that the defendant  
 had, before making the distress, complied with the requisites of that  
 statute; and so, in *Clooney v. Watson* (b), where the notice of  
 distress did not contain the signature or residence of the party  
 distraining, it was treated as a defective notice: the tenant,  
 however, replevied; and the landlord dealt with this as an election  
 by the tenant to avoid the distress, and distrained a second time;  
 and such proceeding was held legal.—[CRAMPTON, J. Should the  
 Court presume this notice was served?—The Court cannot pre-  
 sume against the requirements of the statute. In *Brennan v.*  
*Flood* (c), some doubt is thrown by the Court on *Madden v.*  
*Bryan*; but the Court distinguished it from the case of *Brennan v.*  
*Flood*. It therefore is not overruled, and on its authority we con-  
 tend this defence is defective, and that the demurrer must hold.

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*Curran*, contra.

The statute, no doubt, prescribes certain particulars to be stated  
 in the notice of distress; but why will the Court presume, as  
 against this defence, that these requirements of the statute were  
 not complied with? The defence sufficiently avers that they were;  
 for it says, “ according to the form of the statute in such case  
 made and provided.”—[PERRIN, J. Your averment is that you  
 made a distress according to the statute.—CRAMPTON, J. The  
 plaintiff by his demurrer admits the distress was made according  
 to the statute.]—It was needless for the landlord to have specified

(a) 1 Ir. Com. Law Rep. 322.

(b) 2 Ir. Com. Law Rep. 129.

(c) 4 Ir. Com. Law Rep. 332.

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these requirements in his defence, because they are matters of evidence; and if they were not complied with, his case must fail at the trial. On the same argument as that of the plaintiff here, we should have stated that the distress was made between sunrise and sunset, and that it was not made on a Sunday; because these also are statutable requisites. *Madden v. Bryan* has been doubted, and especially by CRAMPTON, J., in *Brennan v. Flood*; but there the defence averred a delivery of a particular in writing; but it did not specify the name or residence of the party by whom the distress was made, and thus the averment was imperfectly alleged. But, in *Brennan v. Flood*, it was distinctly held that a party distraining need not, in pleading, allege that he delivered a notice in pursuance of the statute. Though that was a case of replevin, it is strong in the defendant's favour here; for, by the 228th section of the Procedure Amendment Act (1853), replevin and trespass are treated as one and the same action. The plaintiff should have replied to this defence, and have stated in his replication the precise omissions complained of in the notice of distress: *Richardson v. Newenham (a)*.

*Coates* replied.

*Cur. ad. vult.*

MOORE, J.

Nov. 11.

This case comes before the Court on a demurrer founded on the 9 & 10 Vic., c. 111, enacting that in all cases of distress for rent, cognisable in any Court, whether Superior or Inferior, the person making any such distress shall, at the time of making such distress, deliver to the person in possession of the premises for the rent of which such distress shall be made, or, in case there shall not be any person found in possession, shall affix on some conspicuous part of the premises a particular in writing of the rent demanded, specifying the amount thereof, the time or times when the same accrued, and the name and place of abode of the person by whom, and (if the person who acts in the making of the distress be not

(a) 13 Ir. Law Rep. 281.

the party claiming to be entitled to the rent for which the distress is made) the name of the person by whose authority the distress is made, or otherwise such distress shall be unlawful and void.

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The plaintiff contends that it was incumbent on the defendant, who sought to justify the act complained of, to show in his defence that he had complied with the requisites of this statute, by delivery or posting of the notice required by that section; and, in support of that proposition, he relies on the case of *Madden v. Bryan*. That case was decided before the passing of the Common Law Procedure Amendment Act (1853); but the facts are in some respects analogous to the present. If this were a case of the first impression, a great deal might be said against this Court coming to a like decision to that of the Court of Common Pleas in that case: but, without saying whether that decision be right or wrong, the case is so identical with the one before us, I think myself bound by it, more particularly as that decision has never been questioned; and the matter being on the record, this opinion, if wrong, may be corrected by the Court of Error. Therefore, without pronouncing any opinion as to whether that decision be right or wrong, I think, upon the authority of that case, that this demurrer ought to be allowed.

PERRIN, J.

I think this demurrer ought to be overruled. If the defence had enumerated what the particulars of the statute were, and which of them the defendant complied with, there would be no question; for then there would have been a defence specifically detailing what is expressed in general terms, and the plaintiff would have an opportunity of making up the issues; one of which would be, whether such a particular in writing as the statute requires was affixed or delivered? But the objection here is, that the defendant did not aver that a particular in writing of the rent demanded, the time when the same accrued, and the name and place of abode of the person by whom the distress was made, had been given or posted; he merely stated he did what the statute required, and that he made

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his distress according to the provisions of the statute. Now if the defendant did not deliver or post the particular, that averment in the defence is untrue, and the distress was not made as alleged, according to the terms of the statute; and, giving full weight to the authority of the case relied on, which I do not go the full length of, it cannot be denied that the more you establish that the statute was followed, the more you prove the truth of the defence.

The defendant avers that he made a distress for non-payment of rent on a particular day, that the rent was in arrear, and that the distress was made according to the form of the statute; which means that it was made in compliance with the forms prescribed, and which are required by that statute to constitute a legal and valid distress. I think that statement is clear and concise. The Procedure Act has passed since that judgment in *Madden v. Bryan* was pronounced, with the intention of disembarassing cases of technical objections hitherto made; and it provides, by the 56th section, that "the defence and replication and subsequent pleadings "if any, shall state all facts which constitute the ground of defence "or reply, in *ordinary language*, and without repetition, and as "concisely as is possible, consistent with clearness." Now it is clear, even according to the old system of pleading, that the plaintiff in this case was at no disadvantage; for "whatever is necessarily "understood, intended and implied, is traversable as much as if "it were expressly alleged:" 2 *Wms. Saund.*, p. 10, *note* 14: and again, 2 *Wms. Saund.*, p. 305, *note* 13:—"All necessary circumstances implied by law in the plea need not be expressed;" 2 *Wms. Saund.*, p. 409, *note* 3; and the plaintiff has the same and every advantage under the new Act which he would have under the old law; nay more, for when he has received the defence he is then to furnish an abstract of the pleadings and the issues in fact to be tried, to the defendant. If the plaintiff be satisfied that the case of *Madden v. Bryan* is law, he could raise on the issue the question, whether these particulars, which are substantially averred in the defence, do or do not exist? Under the old mode of pleading, these matters might be traversed; under the new law, the plaintiff may furnish the issue suggested. I see no advantage to be gained by

putting a long string of requisites on the record, but every advantage in this short and concise mode of pleading. I think the defence full and satisfactory, and that it deprived the plaintiff of no possible advantage. I am therefore of opinion that there ought to be judgment against him, and that this demurrer ought to be overruled.

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CRAMPTON, J.

I concur substantially with my Brother MOORE. The facts in this case and those in *Madden v. Bryan* are much the same, as also are the pleadings; and it does appear to me that we ought not to overrule that decision of the Court of Common Pleas, deliberately adjudicated on. I am not disposed, even if I entertained doubts with respect to that judgment, to overrule it: I should prefer its being considered by a Superior Court. In the case of *Brennan v. Flood*, I am reported to have expressed a doubt respecting that case: that doubt was not, however, with reference to the substance of the judgment; but whether the objection relied on against the plea could properly avail a party on general demurrer; in other respects, I passed no opinion on the case. I do not think it was held, in that case in the Common Pleas, that the words here relied on, "according to the form of the statute," implied that everything required by the Common Law and the statute had been done in the making of the distress. I do not think that these words convey a statement of matter of fact. If there be any doubt as to the correctness of that case, which I do not say there is, it should be decided by a Superior Court; I would rather subscribe to it than make conflicting decisions of co-ordinate Courts. I do not think there is anything in the Common Law Procedure Act to affect this view. The 56th section says that a party should state all the facts of his defence, consistent with clearness; but what are all the facts necessary for a defence? Is it not necessary for a party justifying, to state he furnished the particulars required by the statute? without which, the statute says, the distress should be null and void, and the act done a mere trespass.

It is said further, that a subsequent irregularity should not

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**MURPHY.** vitiate the distress; but this is not a mere irregularity, it is an utter avoidance of the proceeding, and therefore a nullity. A distress without a particular in writing cannot be supported: and there is a section of the Common Law Procedure Act, confirming the authority of the case of *Madden v. Bryan*, the 48th section, doing away with the necessity of a replication, a plain intimation that the person having the first opportunity of stating a fact on which there is a controversy, and which is material to the action, ought to state that fact. Here the plaintiff could not be expected to state the fact; he complains of a single trespass, and the defendant was the first person who had the opportunity of bringing that fact of the distress before the Court. If this fact is supposed to be contained under the words "according to the form of the statute in that case made and provided," then the plaintiff could take issue; but issue is to be taken on facts stated, not on facts supposed. The only course left to the plaintiff was to apply for liberty to file a replication, putting in issue the fact that no particular in writing had been furnished. It lay therefore on the defendant, if this were a necessary part of his case, to state this matter of fact, and then the plaintiff might have taken issue on it; but the defendant has not alleged it: and so it appears to me that the defence is bad, on the authority of *Madden v. Bryan*, and that the demurrer ought to be allowed.

It is of great importance that the practice of the Courts should be uniform, and that no difference should exist on an important question between landlord and tenant; and, without expressing any opinion upon that case in the Common Pleas, I think the better course is to allow the demurrer.

LEFROY, C. J.

I am in the anomalous position of agreeing with each of my Brethren to some extent, although they differ among themselves. I agree with my Brothers CRAMPTON and MOORE in not expressing any opinion upon the decision made by the Court of Common Pleas, and I agree with my Brother PERRIN in thinking this case distinguishable from *Madden v. Bryan*, upon substantial grounds.

I may just say, I entertain some doubt upon the soundness of that decision ; but as I do not rest my judgment on that doubt, I pronounce no opinion on its validity.

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The action here is for breaking and entering the plaintiff's close ; in the case in the Common Pleas, it was for taking and carrying away the goods of the plaintiff. Before the passing of the statute in question, if the tenant complained against the landlord, for breaking and entering his premises, the taking his goods was a mere matter of aggravation ; and if the landlord justified the breaking and entering, the tenant was bound to newly assign, showing the illegality of the distress, and rely on that as making the original entry illegal ; and although the Procedure Act, no doubt, altered that mode of proceeding, it did not alter the principle of the law. In the first place, viewing this as an action for breaking and entering the plaintiff's close, and illegally taking a distress, the alleged illegality of the distress arises from the provisions of 9 & 10 Vic., c. 111, which, for the first time, made the omission of giving these particulars an avoidance of the distress. By the Common Law, the landlord had no occasion to give, much less, allege that he had given, any notice ; but the 14th section of that Act provides that, wherever any rent is due, the landlord should not be made a trespasser *ab initio* by any subsequent irregularity. The complaint here is, that he broke and entered the close illegally. The only way, before the Act, that he could have been made a trespasser by so doing, was by reason of this irregularity ; but the same statute says, the landlord could not be made a trespasser *ab initio* if the rent was due ; that is, his entry was not sufficient to make him a trespasser. The tenant was bound therefore to show that the rent was not due, or that the landlord had not served notice pursuant to the statute of 9 & 10 Vic., c. 111. Instead of traversing the allegation of the rent being due, the plaintiff has demurred to the defence, thereby admitting that the rent was due, and by that statement he puts himself out of Court. That is the first ground on which I distinguish this case from *Madden v. Bryan*.

Further, upon the Common Law Procedure Act, and adopting  
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M. T. 1856. the decision of the Court in *Richardson v. Newenham*, where  
 Queen's Bench a plea to an avowry was held bad because it left the landlord  
 SPEATT in a state of uncertainty as to the precise ground upon which the  
 v. proceeding of the landlord was impeached, I think this defence  
 MURPHY. sufficient. Did the Common Law Procedure Act mean to de-  
 prive the landlord of his right to know what he was to go down to  
 try, between himself and his tenant? If not, the tenant should  
 have stated in his plaint that the landlord entered to make an  
 illegal distress, because he did not serve a particular in writing,  
 of the rent demanded; or else, when the landlord by his defence  
 averred the rent to be due, the plaintiff should have replied, true  
 the rent was due, but no particular of the rent demanded was  
 served; and thus he would have given notice to the landlord what  
 was the issue to be tried. If *Madden v. Bryan*, therefore,  
 have any applicability, I must protest against being supposed to  
 concur in it; because, entertaining doubts about that decision,  
 I do not think, for the sake of a uniformity of decision of co-ordinate  
 tribunals, that Judges should not express a dissent from such  
 decisions if such be entertained.

The reason of my doubt on that decision arises thus:—in an  
 anonymous case before Lord Holt (a), and a case of *Birch v.*  
*Bellamy* (b), it is laid down that, where a party has a Common  
 Law right, the exercise of which is qualified by statute, it rests  
 on the party seeking to abridge that Common Law right to bring  
 forward the statutable provisions against him; so here, the land-  
 lord being entitled to rest on the Common Law right, the tenant  
 was bound to show on his pleading the statutable qualification of  
 it. In one of the cases referred to, the Statute of Frauds was  
 mentioned as an illustration of the rule; and yet, in *Madden v.*  
*Bryan*, the Court is made to say that *Birch v. Bellamy* and the  
 anonymous case in *Salkeld* are cases of demises, assignment, or  
 promises under the Statute of Frauds, and are applicable only to  
 that statute; but Serjeant *Stephen*, in his *Treatise on Pleading*  
 (2nd ed., p. 418), adopting what is laid down in 1 *Saund.*, p. 276,  
 thus lays down correctly the principle:—"Where an Act makes a

(a) 2 Salk. 519.

(b) 12 Mod. 540.

“writing necessary to a matter where it was not so at the Common Law, as where a lease for a longer term than three years is required to be in writing, by the Statute of Frauds, it is not necessary to plead the thing to be in writing, though it must be proved to be so in evidence;” and in *Birch v. Bellamy* it is said:—“If a thing be made good originally by Act of Parliament, there you must plead all the circumstances of the Act, as, upon the Statute of Wills, you must set out that the will was in writing, and so plead it.” Now what makes the qualification of serving a notice or particular necessary here, but the Act of Parliament 9 & 10 Vic., c. 111? At Common Law, service of a notice was not necessary by a landlord before making a distress. The qualification is introduced by the statute; the rule of pleading is not altered; therefore, it lay on the tenant to have adverted to it in his pleading. In *Richardson v. Newenham*, this Court held that the landlord was entitled to the information as to the irregularity complained of. I therefore, with all respect to what is reported to have fallen from Chief Justice Monahan, cannot concur with the judgment of the Court of Common Pleas in the case of *Madden v. Bryan*; but what I rest my opinion on here is, that this case is substantially distinguishable from that case; for here the landlord has justified his entry, and if that entry was illegal, it must be shown to be so by the pleading of the tenant: he has not done so, but, on the contrary, he admits the landlord exercised legally his rights, the rent being due.

My opinion is, that the demurrer should be overruled; but as the Court are equally divided, there can be no rule.

MOORE, J.

To enable the case to be reviewed in a Court of Error, I shall waive my opinion, *pro hac vice*, and agree in overruling the demurrer.

Judgment for defendant.

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May 22, 31,  
 June 9.

THE QUEEN (in error) v. DAVID EVANS.

Where on an indictment charging the prisoner with stealing, and also receiving goods, knowing them to be stolen, the jury found a general verdict of guilty, not specifying on which count the verdict was found; the Court set aside this verdict, for uncertainty, and awarded a *venire de novo*.

In this case the defendant had been indicted before the Assistant Barrister for the county of Kerry.

The indictment contained two counts. The first count charged the defendant with stealing three sheep, on the 15th December 1855, the property of one Ellen Shine. The second count averred that, on the day and year aforesaid, he did feloniously receive the said three sheep, so as aforesaid feloniously stolen, well knowing the same to have been stolen.

On this indictment the jury found the following verdict:—"That the said David Evans is guilty of the premises in the said indictment above specified, in manner and form as by said indictment and the premises therein contained above against him is alleged; and that the said David Evans, as to the premises in said indictment above specified, and every part thereof, did commit the felony upon that occasion." The Assistant Barrister thereupon sentenced the defendant to be transported for the term of seven years.

A writ of error was brought, at the instance of the Crown, to have the sentence so pronounced by the Assistant Barrister quashed, such sentence being illegal, and to have the proper sentence pronounced.

*Corballis* (with him *The Solicitor-General*) appeared on behalf of the Crown.

The sentence pronounced on the defendant was clearly erroneous, there being no such punishment since the late Act as transportation for seven years; and this Court are now at liberty to pronounce a valid sentence of four years' penal servitude, or they may remit the case to the Court below, that the sentence may be amended, and a proper sentence pronounced.—[PERRIN, J. Is there not an inconsistency in the jury finding a general verdict on two distinct

counts?]

—Both counts contain a charge of a distinct and substantive felony, and there is a verdict on both; there is nothing therefore to prevent the Court pronouncing a judgment on one or both.—[PERRIN, J. If there be two distinct felonies, we must pronounce a judgment on both.]—In *Campbell v. The Queen* (a), the judgment was held bad, as it appeared that the two counts were for the same offence; and the word “felony” could not be treated as a *nomen collectivum*; but here the counts are so inconsistent that they must be taken to be different offences, and the Court is to treat the record as if there were a separate finding of guilty on each count: *The King v. Powell* (b).—[MOORE, J. But the second count here refers to the previous felony that had been committed.]—If that be so, and that a previous felony had been committed, then the second count is bad, and the judgment on it may be arrested, and a *nolle prosequi* entered upon that count. In *The Queen v. Rowlands* (c), a *nolle prosequi* was entered on three counts after verdict.—[PERRIN, J. A *nolle prosequi* could be entered if there were a separate finding on each count.]—*Rex v. Hempstead* (d).—[LEFROY, C. J. After verdict, and before judgment, you may enter a *nolle prosequi*, but can you do so after judgment?]—But here the judgment has been removed, and the Court are now to consider the case as if it were before the Court of Quarter Sessions.—[PERRIN, J. There is a difficulty here with regard to a *nolle prosequi*; it may be entered when both counts are quite independent of each other; but the difficulty here is, the counts are not independent, so far as the judgment is impeached for an alleged inconsistency; as for instance, if a demurrer were filed to this indictment, there must be a joinder in demurrer, and the prosecutor could not meet the demurrer by quashing either count. I feel a difficulty therefore as to whether the Crown can meet the defect by entering a *nolle prosequi*.]—The Court must now treat them as distinct offences, and cannot assume that there is any connection between them because of the duplicity: *Hollo-*

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(a) 11 Q. B. 799; S. C., 2 Cox, Cr. Cas., 463.

(b) 2 B. & Ad. 78.

(d) R. & Ry. 344.

(c) 2 Denn., C. C., 384.

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**EVANS.** *way's case (a)* shows that you may arrest the judgment on one count; *O'Connell v. The Queen (b)*. The Court may award a *venire de novo*, and remit the case to the Court below: *Rex v. Huggins (c)*; and there is no difference between awarding it on a jury process and on pleading. Here there has been a mis-trial, and the Court ought to award a *venire de novo*: *Rex v. Edmonds (d)*; *Regina v. Craddock (e)*; *O'Brien v. The Queen (f)*; *Regina v. O'Brian (g)*; *Conway v. Regiam (h)*; *The Queen v. Hinley and another (i)*; *Young v. The King (k)*.

*Morris*, for the prisoner.

This judgment cannot stand; it is inconsistent: the punishment assigned for each offence is not the same; in one case, that for unlawfully receiving the stolen property, the judge has a discretion; in the other, no discretion is given to him. Prior to the passing of 11 & 12 Vic., c. 46, in a case like the present, the prosecutor would have been put to his election. It is impossible that the prisoner could be guilty of both the offences here charged. In *Regina v. Perkins (l)*, it was held that a principal, in the second degree *particeps criminis*, cannot at the same time be treated as a receiver: *Rex v. Roper (m)*. There can be no *venire de novo* awarded to an Inferior Court: *Bishop v. Kaye (n)*; *Trevor v. Wall (o)*.

LEFROY, C. J.

June 9. This case comes before the Court upon a writ of error, brought in consequence of an admittedly erroneous sentence of transportation being pronounced upon the prisoner, such a sentence being no longer applicable to the offence with which the prisoner stands

(a) 17 Q. B. 317.

(c) 2 Ld. Ray. 1574.

(e) 4 Cox, C. C., 409.

(g) 1 Denn., C. C., 9.

(i) 2 M. & R. 524.

(l) 2 Denn., C. C., 459.

(n) 3 B. & AL. 605.

(b) 11 Cl. & F. 415.

(d) 4 B & AL. 471.

(f) 10 Ir. Law Rep. 337.

(h) 7 Ir. Law Rep. 149.

(k) 3 T. B. 98.

(m) 1 Cr. & D. 185.

(o) 1 T. B. 151.

charged. Upon the propriety of setting aside that sentence, there can be no question ; but the difficulty arises upon the record brought before the Court by the writ of error.

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It appears upon that record that the prisoner was given in charge to the jury, upon an indictment containing two counts—one for stealing sheep, the other for receiving the said sheep, knowing them to have been stolen. The count for receiving states expressly the identity of the property stolen and received, and that the prisoner received it, knowing it to have been stolen, and that it was stolen on the same day the prisoner is charged with having received it. This was an indictment framed under the 11 & 12 *Vic.*, c. 46, by which a prosecutor is entitled to insert in an indictment, upon the one transaction, two counts, one for stealing, and another for receiving property knowing it to be stolen, in order to avoid the mischief arising from the prisoner's right to put the prosecutor to his election ; and the consequence of which might be that, if the prosecutor had chosen wrong, the ends of justice might be defeated ; for the prisoner might be acquitted on the charge which the evidence did not support, and he could not then be tried on the other, which the evidence did support : and, to avoid this, the Legislature put an end to the power of election in this particular instance, and enabled the prosecutor to include in one indictment the two counts, so that there might be a conviction on the one or the other, whichever the evidence would support. But whilst this was manifestly a provision for the interests of justice, it was right to guard the prisoner from any disadvantage he might be put to, by stripping him of his privilege to put the prosecutor to an election ; and accordingly the intent of the statute clearly is, that the jury should find a verdict of "guilty" upon one or other of the counts only, and thus exempt the prisoner from the consequences of a general verdict of "guilty" upon the whole indictment, which might be considered as a conviction upon both counts, and might subject him to the punishment for two offences. We are to deal with this indictment by reference to that statute, and we are to treat the prisoner as not having a right to put the prosecutor

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to his election; but, on the other hand, we are to see that he suffers no mischief from which the statute intended to guard him.

Now, on the face of this indictment, the unity of the offence is put beyond doubt, according to the ordinary use of language; and the jury, although they found the prisoner guilty of the whole and every part—that is, evidently meaning, as appears from the sequel, that he was guilty of an offence within the reach of that indictment, yet they did not distinguish between the counts, so as to ascertain within which of them; and they conclude by saying he committed the felony aforesaid. What felony? There are two felonies; and it is impossible therefore for the Court, upon this finding, to distinguish which felony the jury meant. The record has, however, been dealt with as if there was a competent finding on which to give a judgment, and it has been brought here for the purpose; and the question is whether, in this Court, we have materials upon this finding for another judgment? We have a finding before us, which brings the prisoner in guilty; but, as to the extent and nature of his guilt, we are left quite at a loss. We cannot therefore deal with him as in a case in which there was a finding upon which we could act; we must deal with the case as if it were a special verdict on which the Court could not find materials either for a conviction or an acquittal. If a special verdict be so uncertain that the Court cannot pronounce a verdict either of guilt or acquittal, the course is to set aside that verdict, and award a *venire de novo*. The case in *Lord Raymond*, and the later cases, establish that. I see no reason why an uncertain general verdict should not be dealt with in the same way.

We therefore, not having the materials before us, upon this general verdict, for entering a judgment, are of opinion that the proper course is to set aside this uncertain verdict, and to remit the record to the Court below, in order that proceedings may be taken for a new trial, and the Crown will then deal with the case as they think fit; and, if any objection be open to the prisoner, he will be at liberty to take it. Our order therefore will be, that the judgment be reversed, and that the verdict be set aside, and a new trial had.

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## PILSON v. JOHNSON.

Nov. 15, 17.

THIS was an action of libel, for the publication of certain articles, reflecting on the character of plaintiff as a poor-law guardian, in a newspaper called *The Downshire Protestant*, of which the defendant was registered proprietor. The defences were, that the publication was not a libel, that the words were not used in the defamatory sense imputed, and a justification; and, on these, several issues were framed. The case went down to trial at the Antrim Summer Assizes of 1856, had at Belfast, before PERRIN, J.; and on the close of the plaintiff's case, after he had examined several witnesses to prove the inuendos, the defendant's Counsel addressed the jury, and stated the evidence which would be produced, on behalf of the defendant, to prove the justification; but before any of it was called, the foreman of the jury conveyed to the learned Judge, through the Sheriff, that the jury had made up their minds, on the close of the case of the plaintiff, that the publication in question was not a libel, and that the inuendos as laid were not proved. The learned Judge was not called on to discharge the jury on a finding on the issue of justification; and, without any formal charge to the jury, they found for the defendant that the publication was no libel, and that the words were not used in a defamatory sense.

A rule *nisi* having been on a former day obtained, to set aside the verdict, as being against law and evidence, and the weight of evidence, cause was shown by—

*Martley and Macdonogh* (with them *Joy and Harrison*).

The jury took the case into their own hands, and, after the defendant's Counsel had addressed them, they intimated that they found on two issues for the defendant. That finding was had on the plaintiff's own evidence; how then can it be said the verdict is not sustainable, or that it is against law or evidence? They

To an action of libel, defendant pleaded the publication was not libellous; that the words were not used in the defamatory sense imputed, and a justification. On the close of the plaintiff's case, and after the defendant's Counsel had addressed the jury, but before the examination of his witnesses, the jury intimated that they were of opinion that the publication was not a libel, and that the inuendos were not proved. The learned Judge allowed them to find for the defendant, without giving them any direction on the plea of justification, and the jury were discharged without any finding thereupon. Held, that this was a mis-trial, as the plaintiff was entitled to a finding on that defence.



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have found this publication was no libel; and surely the question of libel or no libel is one of fact for the jury, not of law for the Judge. The office of the Judge is to explain to the jury what constitutes the offence of libel, and then leave it to them to say whether or not the publication before them be or not within that definition; and, as incidental to that, whether it is calculated to injure the character of the plaintiff: *Parmiter v. Coupland* (a).

*Whiteside* and *R. Andrews* (with them *T. O'Hagan* and *T. K. Lowry*) were called on to support their rule.

All the evidence was on one side; the verdict is therefore against evidence, and the weight of evidence. Here there was a plea in fact of the general issue and plea of justification, and there is no finding on the latter. In an action of libel, in which there was a plea of "not guilty," which was found for the defendants, and a special plea, in support of which no evidence was given, but which was found for the plaintiff, it was held that the plaintiff was entitled to the *postea*, for the purpose of having his costs on the second issue: *Empson v. Fairfax* (b); *Spencer v. Hamerton* (c); *Hart v. Cutbush* (d). The charge against the plaintiff was of an aggravated character, of gross misconduct in his character of a poor-law guardian; almost identical with *Cheese v. Scales* (e), where the declaration in libel charged the defendant with having published of and concerning the plaintiff, who had formerly served some parochial offices, that, when out of office, he had advocated low rates, but when he came into office, he had advocated high ones, and raised a large sum of money not to be paid to the poor, and that he was a person in whose hands defendant would not entrust £5 of his private property; and it was held sufficient, on motion in arrest of judgment. There was no doubt the publication here was a libel: *Woodard v. Dowsing* (f). There it was ruled that written slander, tending to bring the plaintiff into public hatred and contempt, is actionable; as where an overseer is charged with

(a) 6 M. & W. 105.

(b) 8 A. & E. 296.

(c) 4 A. & E. 413; S. C., 6 Nev. & M. 22.

(d) 2 Dowl. 456.

(e) 10 M. & W. 488.

(f) 2 M. & Ry. 74.

oppressive conduct towards paupers, in compelling them to receive payment of their weekly parish allowance in orders for flour upon a particular tradesman; and so in *Clements v. Chives* (a), where a written or printed publication, stating that a person was guilty of gross misconduct in insulting persons in a barefaced manner, it was held libellous.—[PERRIN, J. In *Spong v. Fahy* (b), this Court decided that the issue of libel or no libel was a proper one for the jury; but I entertained a different opinion.]—Where the Judge is stopped by a jury, in summing up in favour of one of the parties, declaring themselves satisfied, and finding immediately for the other, it is good ground for a new trial: *Gainsford v. Blackford* (c). This is the case where the jury have drawn a wrong conclusion on facts admitted, and therefore there must be a new trial: *Bright v. Eynon* (d); *Mellin v. Taylor* (e). There the Court granted a new trial, on the ground that the verdict was against the weight of evidence, notwithstanding there was some evidence for the defendant.

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*Macdonogh* replied.

It was the duty of the plaintiff to have called for a finding on the plea of justification; and it is no misdirection if the Judge leave to the jury the question whether or not the publication be libellous, without stating his own opinion as to the particular publication, or defining what generally constitutes a libel: *Baylis v. Lawrence* (f). —[LEFROY, C. J. Lord Denman in that case uses strange language.]—Be that as it may, where there are two distinct pleas, and the first, being found for the plaintiff, renders a finding on the second immaterial, the proper course is to discharge the jury from finding any verdict upon it: *Cossey v. Diggins* (g). Here the proper course was taken by the Judge, by discharging the jury; and a finding on the plea of justification was immaterial, when the jury found the publication was no libel.—[LEFROY, C. J. If a jus-

(a) 4 M. & Ry. 127.

(b) 5 Ir. Com. Law Rep. 351.

(c) 6 Price, 36.

(d) 1 Burr. 390.

(e) 3 Bing. N. Cas. 109.

(f) 11 A. & E. 920.

(g) 2 B. & Ald. 546.

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tification be put on the record, there should also be on the record a finding that it is false or true; otherwise, its appearing there may be worse and more injurious than the libel itself.]—But it was the duty of the plaintiff to have called on the Judge to direct a finding on the other issues; and, not having done so, and the Judge having discharged the jury, this verdict is good, because of the finding on the general issue: *Dibben v. Lord Angleson* (a). The issues here are material as to costs, and therefore plaintiff should have asked for a finding: *Powell v. Sonnet* (b).—[CRAMPTON, J. If this be not a libel, the verdict should stand; if it be, the Court ought to set it aside.—LEFROY, C. J. The subject-matter for our consideration is not whether there should or should not have been a discharge of the jury without a finding, but whether we can set aside this verdict on either of two grounds—whether this was a libel, and whether it was used in a defamatory sense?—We say it was no libel, having regard to the circumstances of the case; it conveyed no imputation of personal feeling; it referred to the plaintiff in the honorary office of poor-law guardian, without imputing to him corruption, and did not charge him with any personal corruption. Charging a Member of Parliament with want of sincerity is not actionable: *Onslow v. Horne* (c).

LEFROY, C. J.

Without expressing any opinion calculated to influence the Judge or jury, I am, on the whole matter, disposed to think that it would not be a just or satisfactory result to bind the plaintiff by this verdict, considering the circumstances under which the case went to the jury. It would be different, if the jury had but to consider was this a libel, was it published with the intent of defaming the plaintiff, and was the justification intended but as a sting, which, if put in the libel, might have materially affected the finding? The plaintiff is entitled to a finding on the record on this justification of the defendant, and therefore we must make the rule absolute for a new trial.

(a) 10 Bing. 568.

(b) 1 Bl., N. S., 532.

(c) 3 Wils. 177.

CRAMPTON, J.

I concur with my LORD CHIEF JUSTICE, and refrain from the expression of an opinion whether or not the publication in question be a libel. The trial has been unsatisfactory, and the result does not establish a fair measure between the parties. It appears that, after the plaintiff had closed his case, the defendant's Counsel addressed the jury (and, we must assume, most successfully, for they were carried away by the address), and the most material thing was overlooked, viz., the defence of justification. When the defendant's Counsel intimated that he would call no witnesses, that entitled the plaintiff to a finding on that defence; for he became thereby freed from the imputations conveyed in the paper. There was, I think, a fatality in the case, because the plaintiff should have had a finding on that justification.

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PERRIN and MOORE, JJ., concurred.

Rule absolute.

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*Andrews* referred to 19 & 20 *Vic.*, c. 102, s. 50:—"When a new trial is granted, on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the Court shall otherwise order."

*Macdonogh.*

The Court have not said that the verdict is against evidence.

LEFBOY, C. J.

The costs must abide the result, and the ultimately successful party must get them.

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## LEAKE v. NOBLE.

Nov. 4.

Rent due by a third party is attachable, under the 63rd section of the Common Law Procedure Act (1856).

CARR, on the part of the plaintiff, moved for an attachment order. He relied on the affidavit of the plaintiff, which stated that he had obtained a judgment in this Court against the defendant, in Hilary Term last, for a sum of £150, which still remained unsatisfied; and that it appeared there was due to the defendant by one Thomas Gresham, who was within the jurisdiction of the Court, the respective sums of £150 and £30, less poor-rate and income-tax, out of premises situate at Kingstown in the county of Dublin. He relied on the 63rd section of the Common Law Procedure Act (1856.)

MOORE, J. (*solus*).

I doubt very much whether this enactment was intended to apply to cases between landlord and tenant; however, as a similar order has been made by the Court of Common Pleas, I will grant a conditional order.

*Per Curiam.*

Let so much of said sum of £180, less poor-rate and income-tax, so due to the said defendant by the said Thomas Gresham, be attached, to answer said judgment debt, serving the order personally on Thomas Gresham.

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NOTE.—Several similar orders have been made, attaching rent. In Trinity Term last, on the 23rd of June, a similar order was made absolute in the case of *Evans v. Nolan*. The order is conditional in the first instance, and a motion to a Judge is required to make it absolute, even though no cause be shown.

M. T. 1856.  
*Queen's Bench*

## THE MARQUIS OF HERTFORD

v.

## THE ULSTER RAILWAY COMPANY.

Nov. 4, 11.

In this case an action had been brought by the plaintiff against the defendants, for money alleged to have been paid by him for their use; and by consent of the parties, and by leave of the Court, the following case was stated for the opinion of the Court:—

That in 1835, pursuant to the statutes then in force relating to the establishment of composition for tithes in Ireland, a certain composition for all tithes payable within the parish of Lisburn, otherwise Blaris, in the county of Antrim, was duly made, and the entire annual amount of said composition was duly ascertained and fixed by a certain certificate duly made and signed by a certain Commissioner duly appointed in that behalf, and the entire annual amount of said composition was, in and by said certificate, certified to be payable to the Very Rev. James Stannus, as rector of the said parish; and afterwards the same was duly assessed and applotted on all the titheable lands of and within the said parish, and the said applotment was duly signed by the said Commissioner.

That upon a certain portion of said titheable lands, which are the lands included in the conveyance by the plaintiff to the defendant, hereinafter mentioned, the sum of £4. 7s. 1d. was duly assessed and applotted in manner aforesaid, to be payable annually to the Rev. James Stannus as such rector as aforesaid.

That at the time of making the certificate and applotment, and down to the execution of the conveyance, the plaintiff was seised of all the lands in said parish, for the first estate of freehold of inheritance, under which, or derived wherefrom, there was not any perpetual estate or interest within the meaning of 1 & 2 Vic., intituled, "An Act to Abolish Compositions for Tithes in Ireland, and to Substitute Rentcharges in lieu thereof."

An applotment was made under the Tithe Composition Act, on certain lands, of which Lord H. was entitled to the first estate of inheritance. The defendants, for the purposes of their Railway, took a conveyance of the estate from Lord H. The tithe, pursuant to 1 & 2 Vic., c. 109, had been reduced one-fourth.

*Held*, that the tithe rentcharge, imposed by 1 & 2 Vic., being substituted in lieu of the charge formerly created on the lands, remained a charge thereon, and that the lands being occupied as a Railway made no ground of exemption.

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That by an Act of 6 W. 4, c. 53, intituled, "An Act for making  
"a Railway from the Town of Belfast to the City of Armagh, in  
"the Province of Ulster in Ireland," certain subscribers therein  
named, to the undertaking therein mentioned, were incorporated,  
and thereby empowered to purchase and hold lands, and to construct  
a Railway through the several parishes in said Act specified.

That the said Act received the Royal assent on the 19th of May  
1836, and contained several provisions, to which the parties, plaintiff  
and defendant, agreed to refer, without setting them forth in detail.

That the undertaking authorised by the said Act was subsequently completed, and for that purpose the said Railway Company exercised their statutable powers of taking lands the property of individual proprietors, and, amongst others, of the plaintiff.

That by deed poll, under the hand and seal of the plaintiff, bearing date the 20th of May 1837, in consideration of the sum of money therein mentioned, paid to the plaintiff by the defendants, pursuant to the Ulster Railway Act, the plaintiff did grant and alien to the defendants, their successors and assigns, certain portions of the lands of the parish of Lisburn, otherwise Blaris, being the said portion of the lands of said parish upon which the said sum of £4. 7s. 1d. was apportioned, as and for the annual amount of composition in lieu of tithe, payable to the said rector, and all the estate and interest of the plaintiff therein, to hold the same, with the appurtenances, to the defendants, their successors and assigns, for ever.

That upon the said portions of land comprised in the said deed of conveyance, the defendants had constructed a portion of the Railway, which they were authorised to make between Belfast and Armagh, and had, since the execution of said deed of conveyance, used the said portions of land for the purposes of said Railway.

That at the time of the passing of said Act, intituled, "An Act to Abolish Composition for Tithes in Ireland, and to Substitute Rent-charges in lieu thereof," the defendants had, and from thence hitherto still have, the first estate of inheritance in said lands comprised in said conveyance, under which, or derived wherefrom, there was not any perpetual estate or interest subsisting, within the meaning

of the said last mentioned Act; and that the three-fourths of said annual sum of £4. 7s. 1d., so as aforesaid applotted on said lands, as and by way of composition in lieu of tithes, amounted to the annual sum of £3. 11s. 3d.

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That on the 1st of November 1855, the sum of £64. 2s. 6d. became due and owing to the said rector, as and for eighteen years of the said annual sum of £3. 11s. 3d.

That on the 2nd of November 1855, the said rector applied to both plaintiff and defendants for payment of said sum.

That the defendants refused to pay, and insisted that, according to law, the lands which had been used and occupied by them for the purposes of the said Railway were exempt from the payment of tithe rentcharge; but they promised the plaintiff that in case he would pay said sum of £64. 2s. 6d. to the rector, they would repay him in case the lands so used and occupied by the defendants for the purposes of the Railway were not, nor are, according to law, exempt from the payment of tithe rentcharge.

That the plaintiff accordingly, on the 1st of January 1856, paid the said sum to the rector.

The question submitted to the Court was, "whether, according to law, the defendants were exempt from the payment of tithe rentcharge, in respect of the lands so occupied by the said Railway, in the said parish of Lisburn?"

*Harrison and Joy*, for the plaintiff.

This is the first attempt made to exempt a Railroad from liability to tithe rentcharge. It will be argued that it is a highway, and therefore comes within the exemptions in the Tithe Acts, especially within the exception of "public road, highway or canal," in 5 G. 4, c. 63. But a Railway is not a highway; it is not common to all the Queen's subjects, as a river; it is common to all the Queen's subjects on payment of a settled fare; it may be called a special highway; but it is not a highway within the definition of such in *Co. Lit.*, p. 56 a. If Railways were exempt from chargeability to tithe, the land becoming disused for that purpose would remain free; and how could the tithe be re-assessed on other lands?



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On reference to some of the sections of the statutes on tithes, it is evident that the lands in question are not exempt from liability to this rentcharge. By 4 G. 4, c. 99, s. 21 (Goulburn's Act), Commissioners are to make a survey and valuation of all lands not tithe-free in the parish; and by the 25th section, they are to make a certificate, stating the amount of composition, and in what proportion, to be paid, in satisfaction of all tithes in the parish. That certificate is, by the 31st section, conclusive evidence of the amount of the composition, unless appealed against; and by the 34th section, the Commissioners are to assess and applot the full amount of such composition upon all land within the parish, not being tithe-free. Then the 35th section provides that, in case after assessment of such composition, any land in the parish made subject to the payment of any part of such composition shall, by virtue of any decision in Law or Equity, be declared to be exempt from the payment of tithes, two Justices of the Peace may assess the sum formerly assessed on such exempted lands, in proportion, on the occupiers of all other lands within the parish, not being tithe-free. Then by 5 G. 4, c. 63, s. 22 (on which the defendants rely), in the assessment and applotment of any composition for tithes under this Act, or under 4 G. 4 (Goulburn's Act), "no public road or highway, nor any canal or inland navigation, nor any waste or uncultivated land on the sides of any such road, &c., shall be, or ought to be, assessed; and any assessment made before the Act, on roads, &c., is to cease." That 5 G. 4 really applies to assessments made when the land was used for a public highway at the time of the assessment. It does not say that no land used at any time for the purpose of a public road shall be assessed; and it seems to have been passed to prevent the Commissioners dividing a bulk sum over unproductive roads along with other lands. Then 7 & 8 G. 4, c. 60, s. 4, declares every assessment made before 5 G. 4 is to remain good and valid, and every road assessed so to remain liable, until a new assessment is made under 7 & 8 G. 4. The 5th section enables parties interested in such assessed road, or the incumbent of the parish, to have same revised before the Assistant Barrister, and to assess

the amount over the remaining lands. The 2 & 3 *W.* 4, c. 119 (Stanley's Act), recites these previous statutes, and that it was expedient that a fixed and permanent composition in lieu of tithes should be generally established, and, therefore, that these previous Acts should be modified. Accordingly, by its 3rd section, in parishes where the composition shall not be made within three months, the Lord Lieutenant may nominate a Commissioner, who shall fix the amount of composition, and shall proceed to ascertain and fix the amount of the yearly sum of money to be paid to the incumbent or other person entitled to the tithes. By the 6th section, all compositions shall continue for ever, subject to variations, according to the price of grain, every seven years; and the 12th section relieves all tenants at will, and yearly tenants, from the payment of tithe, and imposes it on the person having the first estate or interest greater than a yearly tenancy, and devolving ultimately on the person having the fee-simple and inheritance of the land. The 17th and subsequent sections provide for cases of agreement; but the sections of the former Acts remain in force, save so far as they are modified by this Act. Then comes the Million Act (3 & 4 *W.* 4, c. 100), which it is needless to advert to; and the legislation ends with 1 & 2 *Vic.*, c. 109 (The Rentcharge Act). By the 7th section of that Act, "Every parcel of land charged with, or in respect whereof, the said tithe compositions, or any applotment or assessment thereof, would have been payable if this Act had not been passed, shall be and become severally liable to, and charged with, the payment of an annual sum or rentcharge, equal to three-fourths of the annual amount of such tithe compositions; and that such rentcharges shall (except as hereinafter excepted) be payable by the party having in such lands respectively the first estate of inheritance, or other estate or interest, equivalent to a perpetual estate or interest as hereinafter defined." And by section 13, it is provided that compositions for tithes, under 2 & 3 *W.* 4, c. 119, may be appealed against before the 1st of October 1838; and by section 15, applotments may be amended; and the 16th section declares that, "Where any person having any interest in any lands,

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"whereon any such composition shall have been applotted, shall dispute the liability of such lands thereto, by reason of such land having been tithe-free, or not rightfully charged with, or otherwise not subject to, such tithe compositions, or the applotment thereof, it shall be lawful for the Court of Chancery or Exchequer in Ireland, upon the petition of any such person, in a summary way, to make such order, allowing or disallowing such claim of exemption." And, by the 24th section, this rentcharge is payable amongst the persons who, if this Act had not passed, would have been entitled to composition for tithes arising out of the lands charged, and in the same proportions; and the 26th section enacts that the certificate therein mentioned, declaring the persons entitled to the rentcharge, to be valid and effectual, until otherwise declared by the Court of competent jurisdiction. That section also provides for a person asserting his right to the tithe, in opposition to the certificate, that is, to the person entitled by the certificate to receive the tithes; but it does not apply to a person claiming through such party.

The result of the legislation is that, under Goulburn's Act the tithe is paid by the occupier—under Stanley's Act by the person having an estate greater than a tenancy from year to year—under the Rentcharge Act by the person having the first estate of inheritance. But there is nothing in the Acts to exempt a Railway from liability if the lands have been assessed; it is not a public road or highway; it is not common to all the subjects of the Queen: it is private property, and if trespass be committed on it, the offence is actionable. The proprietors of the Ulster Railway are but a trading corporation for the purposes of profit, and the land which they use may be at any time disused for that purpose, and will then revert to the owner. By the English Tithe Commutation Act, 6 & 7 W. 4, c. 71, a power is given to recover tithe rentcharge on Railways in England by distress and entry, as on other lands; but here no such power is necessary, for it is the person having a particular estate who is liable: *The London and Blackwall Railway Co. v. Letts* (a); *The King v. The Commis-*

(a) 3 H. Lds. Cas. 470.

*sioners of the Nene Outfall* (a). The Tithe Acts are Acts of indemnity for injuries to legal rights; and no matter to what purpose these lands may now be applied, having been assessed for the tithe composition unappealed from, and not coming within the exemptions of the statutes, they remain charged.

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*Vance* and *Napier*, for the defendants.

In the year 1835, a composition for tithes payable within the parish of Lisburn was made, and £4. 7s. 1d. assessed on the lands in question; that assessment was made under the 4 G. 4, c. 99. We rely on the 5 G. 4, c. 63, s. 22, which has been referred to, and which provides, "That in the assessment and applotment of any composition for "tithes, under the provisions of the recited Act (4 G. 4), or this "Act, no public road or highway, nor any canal or inland navigation, &c., shall be, or ought to be, assessed or charged to the "raising of any part of the sum or sums to be raised by such "assessment or applotment; and that if any such assessment or "applotment hath been made at any time before the passing of "this Act, whereby any such road, highway, canal or navigation, &c., hath been assessed or charged to any such composition, "such assessment and applotment shall, as to any such road, "highway, canal or navigation, &c., cease and determine, and be "no longer paid or payable," &c. It is said in *O'Leary on Tithes*, p. 140, that in the case of an old road stopped up and turned into arable land, and a new road opened, neither the old road or the new one will be chargeable with any composition established since 1824, because the old road ought not, under the 5 G. 4, to have been assessed, and the new one is exempt. In this case the tithe-owner will lose the sums assessed on the quantity of ground taken up by the new road, and there is no provision for either charging that sum on the old road taken in, nor for re-assessing it on the rest of the parish. The 7 & 8 G. 4, c. 60, s. 4, enacts that every assessment or applotment, made before the passing of 5 G. 4, shall remain good and valid, and that every road, highway and canal which shall have been subjected

(a) 9 B. & C. 875.

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to such assessment or applotment, *before* the passing of 5 G. 4, shall remain and continue liable to such assessment and applotment, until a new or additional applotment shall be made, pursuant to the directions thereafter contained; and the 5th section provides, "That when any assessment or applotment shall have been made, *before* the passing of 5 G. 4, whereby any such road, highway or canal shall have been assessed or charged to any such composition for tithes, it shall be lawful for the person interested in the road, &c., or for the incumbent, to apply to the Assistant Barrister to revise the applotment, and to make a re-applotment." But that section has no application to the present case, because the applotment was made *after*, not *before*, the passing of 5 G. 4: that 5 G. 4 exempts future highways; and even if 8 G. 4 contained a declaratory clause to the effect that 5 G. 4 was confined to anterior roads, such clause could not affect the legal construction of 5 G. 4. The argument of the plaintiff is, that the exemption only extends to highways subjected to applotment or assessment before the passing of 5 G. 4; and that is founded on 7 & 8 G. 4. But the answer is, that 5 G. 4 exempts highways from being chargeable, to the raising of any sum whatsoever applotted under the authority of either Goulburn's Act or the 5 G. 4; and the 19th section provides for applotments being made at any indefinite period after its passing. Up to the passing of Stanley's Act (1 & 2 Vic., c. 109), an applotment might have been made under the 19th section of 5 G. 4; and it cannot be contended that, in the teeth of the 22nd section, any highway could have been charged with the raising of any part of the sum or sums to be raised by such an applotment. Then is the Railway a highway?" *Bac. Ab., Highway*:—"There are, says my *Lord Coke*, at this day three kinds of way; but notwithstanding this distinction, it seems that any of these ways, which is common to all the King's subjects, may properly be called a highway; and that a river, common to all men, may also be called a highway." Again, in *Com. Dig., Highway*, letter A:—"A great road, common to all passengers, is a highway." The passage in *Co. Lit.*, p. 56 a, referred to in *Bac. Ab.*, is this:—"There be three kinde of wayes, whereof you shall read in our ancient bookes.

“first, a footway, &c.; the second is a footway and horseway, &c.; M. T. 1856.  
 “the third is *via* or *aditus*, which contains the other two, and also a *Queen's Bench*  
 “cartway, &c., and this is twofold, viz., *regia via*, the King's high- *HERTFORD*  
 “way for all men, *et communis strata* belonging to a city or town, *v.*  
 “or between neighbours and neighbours.” *The King v. The Severn* *THE ULSTER*  
*and Wye Railway Co. (a)*. In this case a Railway was made under *RAILWAY*  
 the authority of an Act of Parliament, which authorised all persons *COMPANY.*  
 to use it with waggons constructed as thereby directed, upon  
 payment of certain rates. The Company afterwards caused a  
 portion of the Railway to be taken up; an application was made  
 for a *mandamus* to compel them to reinstate the Railway; and  
 it was resisted on the ground that it was not a public highway,  
 but was common only to those passengers who choose to use  
 carriages of a particular description, as by a person on horseback.  
 But the Court granted the *mandamus*, Holroyd, J., observing:—  
 “It is a public highway, to be used in a particular mode; a footway  
 “can be used only by foot passengers, and not by others, yet it is  
 “certainly a public highway.” *The Northam Bridge Company v.*  
*The London and Southampton Railway Company (b)*. In this  
 case a question arose as to whether a certain road was a turnpike  
 road, over which, according to their Acts, the defendants (the Rail-  
 way Company) were obliged to carry their Railway, or whether  
 they might cross it? and it was contended that it was not a turnpike  
 road, because it was not subject to the provisions of the general  
 Turnpike Act; but the Court decided that the test of its being  
 a turnpike road was, whether a right to levy tolls existed; and  
 the case of *Rex v. The Trustees of Great Dover Street Road (c)*  
 was relied on; where it was held that although the trustees of that  
 road were shareholders and owners of the soil, and although the  
 tolls were to be paid in liquidation of the interest and principal  
 of the shareholders, the road was a turnpike road within the mean-  
 ing of the general Turnpike Act. *The Queen v. London and*  
*South Western Railway Company (d)*. There Lord Denman says,  
 (p. 575):—“The Company may therefore be simply the owners of

(a) 2 B. &amp; Ald. 646.

(b) 6 M. &amp; W. 428.

(c) 5 Ad. &amp; Ell. 692.

(d) 1 Q. B. 558.

M. T. 1856. "the way, on which others may place steam-power and carriages,  
*Queen's Bench* "and convey persons and goods; and these two parties would then  
 HERTFORD "stand much in the same relation to each other as the trustees of a  
 v. "turnpike road and the coach and post-masters conveying passengers  
 THE ULSTER "on it;" and again (p. 577), "The Railway is thus, under certain  
 RAILWAY qualifications, thrown open to the public as a highway." *Bishop*  
 COMPANY. v. *North* (a); *The Great Northern Railway Company v. The*  
*Eastern Counties Railway Company* (b).

*Cur. ad. vult.*

LEFROY, C. J.

Nov. 7.

This was a special case for the opinion of this Court; and the question for us to decide is, whether the defendants are exempted from the payment of tithe rentcharge, in respect of the lands occupied by their Railway, in the parish of Lisburn in the county of Antrim? It appears to us that there is upon the case stated (examined in reference to the Tithe Rentcharge Act) a clear case of *non*-exemption; that the lands are *prima facie* liable, and that nothing has been laid before the Court to displace that *prima facie* liability. The case refers to the Tithe Composition Act, and states the provision of the statute by which an annual compensation in money was substituted in lieu of tithe in kind, payable out of the fruits of the earth; and it states, that a certain composition for tithes in the parish of Lisburn was duly made, and the annual amount of the composition duly ascertained and fixed by a certificate of the Commissioner, and that a sum of money (£4. 7s. 1d.) was *duly* assessed and apportioned under that Act, to be payable annually to the incumbent, Dean Stannus, as rector of the parish of Lisburn. It admits that, at the time of making that certificate and apportionment, and down to the time at which the defendants became possessed of and entitled to the lands, the plaintiff was entitled to the first estate of inheritance in the lands, which, by virtue of the Tithe Rentcharge Act (1 & 2 Vic., c. 109), and by the express terms of that Act, as appears from the 7th section, became liable to the rentcharge, having been previously subject to

(a) 11 M. & W. 418.

(b) 9 Hare, 306.

a charge under the Composition Act. There was this difference, however, that the amount payable for tithe was to be reduced to one-fourth less than the sum ascertained by the tithe composition; and this Act contained a provision by which the party on whom the charge was imposed might obtain relief, if he had any ground of complaint, either as to the amount of the composition, or even as to the existence of the charge. That being so, and the rentcharge, equal to three-fourths of the sum theretofore duly apportioned on the lands in the possession of the Marquis of Hertford, being a first charge thereon, it appears that subsequently the defendants took a conveyance of this first estate of inheritance from the Marquis. The tithe rentcharge, only reduced in amount by 1 & 2 Vic., having thus attached on the lands, it is stated that the defendants took the conveyance of the lands, and, on the express admission in the special case, they thereby became entitled to the first estate of inheritance, subject to the tithe rentcharge, reduced, as I have said, in amount, according to the provisions of the statute.

The question then is, whether the defendants, who are *prima facie* liable, have shown to the Court any ground of exemption? We do not feel called on to give any opinion on any matter antecedent to the charge imposed on the lands by 1 & 2 Vic.; it is enough to say that the rentcharge imposed by that Act, as substituted in lieu of that which, on the case, is admitted to have been duly charged upon the lands, remains, and that there is nothing in the 1 & 2 Vic. exempting these lands from the charge, to whatever purpose the lands are applied, whether to roads, canals or highways. It is not necessary therefore to decide whether a Railroad is to be deemed a public road; for as no exemption has been made out, and the tithe composition stood duly charged on the lands, the defendants take the land subject to this charge. Even adverting to the Tithe Composition Act, and the anterior Acts, the principle pervading all of them is this, not that the income of the incumbent should be reduced by the operation of these Acts, by reason of any exemption in reference to canals, or roads or highways, but that whatever relief was given on account of roads, canals or highways, was not to be given at the expense of the incumbent; but that such was to be



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regulated by arrangement between the parish and the exempted lands, and in no case was that arrangement to be made to the prejudice of the incumbent. That policy was not deviated from by 1 & 2 Vic. ; and we should be violating the very principle of the whole of this code, if we were to hold that the defendants were to enjoy these lands exempt from tithe rentcharge. Judgment must be for the plaintiff.

Judgment for the plaintiff.

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ALEXANDER MONTGOMERY and others

v.

ARTHUR MONTGOMERY.

T. T. 1856.  
 June 11.

A party named in an ejectment as a plaintiff, without his consent, will be struck out of the record, notwithstanding an indemnity offered, unless it be shown he was a trustee for the other plaintiff.

R. ARMSTRONG moved, on behalf of one of the plaintiffs in this cause, Alexander Montgomery, that his name be discontinued as a plaintiff in this action of ejectment, same having been used without his consent or authority. He moved on the affidavit of Alexander Montgomery, which stated that a previous ejectment had been brought for the recovery of the premises in question, and a verdict found in that cause for the defendant, and that it was now sought to re-agitate the question by introducing the name of Alexander Montgomery.

*T. O'Hagan and Vance, contra.*

The plaintiff Alexander Montgomery is a mere naked trustee, in whose name a renewal has been obtained, and not a trustee for the co-plaintiff. If it could be shown he was a trustee for the other plaintiff, we could not resist this application ; but the legal estate being vested in him, the just rights of the plaintiff will be defeated if he be not a party to the suit. We are willing to give him a full indemnity.—[LEFROY, C. J. We cannot try the question whether he be a trustee or not for plaintiff, on affidavit ; to establish that, you must file a bill in a Court of Equity.]—In *D. Prosser v. King (a)*, which will be relied on by the other side,

(a) 2 D. P. C. 580.

the trustee claimed adversely.—[CRAMPTON, J. In that case the party was a trustee for the inheritance.]—The Court, in a case like the present, has an equitable jurisdiction; the present application is brought forward solely on the suggestion of the defendant, to defeat this ejectment, and there is no allegation that Alexander Montgomery is a trustee for the defendant.

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*Norman* replied.

The plaintiff is bound to show he is a trustee for him, to justify him in the use of his name; otherwise, in refusing this application, the Court would be assuming the jurisdiction of a Court of Equity, by giving an equitable decree.

LEFROY, C. J.

It must be shown he is the trustee of the party who seeks to use his name; that is the established and safe rule in such cases. Another trust may exist, which can only be established in a Court of Equity; but this Court have no power to interfere in such a case.

*Per Curiam.*

Let the name of the said Alexander Montgomery be discontinued as a plaintiff in this cause; and let the remaining plaintiffs pay to Alexander Montgomery the costs of this motion.

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SULLIVAN and others v. SULLIVAN.

M. T. 1856.  
 Nov. 16.

THIS was a motion to strike out the name of Elizabeth Ward as a plaintiff in the summons in ejectment sued out in this cause.

In an ejectment, the Court has no authority to

permit a party's name to be used as plaintiff without his sanction, unless it is shown by the other plaintiffs that the party so named is in fact a trustee for them.

In every case moved in Chamber, and directed to stand over for the Full Court, a notice of renewing the motion must be served.

M. T. 1856. The motion was moved before PERRIN, J., in Chamber ; and, after argument, he directed it to stand for the Full Court. The facts of the case are as follow :—  
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On the 24th of February 1818, a mortgage of the lands, the subject of this action, was made, to secure £900, and this mortgage was in the year 1851 assigned to and vested in Elizabeth Ward, the applicant. The said Elizabeth Ward was the maternal aunt of the defendants, who were minors, and on whom descended the equity of redemption in said lands ; and this action was brought for the purpose of trying the legitimacy of the minor defendant, by the co-plaintiff, who claimed to be heir-at-law of the mortgagor.

The attorney for Elizabeth Ward made an affidavit, in which he stated that the plaintiffs' attorney, without the knowledge, sanction or authority of Elizabeth Ward, inserted her name as a plaintiff ; that he called on the plaintiffs' attorney to get her name struck out of the plaint, or that an application would be made to the Court to do so. The plaintiffs' attorney declined to strike out the name, but offered to give Elizabeth Ward a complete indemnity against costs, alleging that he was advised by Counsel that it was absolutely necessary to make her a party plaintiff.

*J. W. Sherlock*, for the motion.

It is against principle and policy to make this person a plaintiff against her will ; there is no privity between her and the other plaintiffs. She is a mortgagee in her own right, and has a title paramount to them. Unless she is shown to be a trustee for the other plaintiffs, this Court has no jurisdiction to retain her as a plaintiff. She is not a trustee ; if she were, then the indemnity being given, the Court would permit her name to be used ; but an indemnity against costs does not entitle a plaintiff to use a stranger's name as co-plaintiff, without showing the privity of trusteeship between them : were such a thing allowed, no one's title would be safe. The plaintiff must go into a Court of Equity to set aside the legal bars, or issue a new plaint, and apply to this Court under the new Procedure Act : *Wallace v. Ejector* (a) ;

(a) 2 Law Rec., O. S., 394.

*Doe d. Prosser v. King (a)*; *Doe v. Fillis (b)*; *Doe v. Clifton (c)*. At all events this Court has, in the case of *Montgomery v. Montgomery (d)*, decided that unless it was shown that Montgomery was a trustee for the plaintiffs, they could not use his name, even after giving him a sufficient indemnity; and the Court will not now, without good grounds, overrule that decision.

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*Exham*, for the plaintiffs.

It would be a matter of the greatest hardship were this motion to be successful. We charge that this person is in collusion with the defendants, and for that purpose she refuses to let her name be used. We have offered her every indemnity against costs. She is the aunt of the minor defendant, and colludes with him to prevent our trying the question of his legitimacy. She has really no interest in this question. We do not seek to disturb her mortgage, and will give any undertaking to that effect. If we now issued a new plaint, the Statute of Limitations would run against us; and if we filed a cause petition to set aside the legal bars, we might have a difficulty in proceeding on the plaint already issued. Under these circumstances, the Court will not permit this person, who has no interest therein, to attempt to defeat our trying a just question. In any case, we are satisfied to pay off her mortgage, and will do so at once, if this Court directs. In order to avoid being named a plaintiff, she should show that her interest was opposed to plaintiffs' rights, and that she intended to dispute them; that is the ground of the decision in *Doe d. Prosser v. King*, where Judge Patteson says:—"The trustee merely says he claims adversely. He should have stated more explicitly his claim to the inheritance." *Doe v. Figgings (e)*.

*Per Curiam.*

This point has been already settled in this Court; and we see no grounds for departing from that decision. The plaintiff

(a) 2 Dowl. P. C. 580.

(b) 2 Chit. R. 170.

(c) 4 Ad. & Ell. 809.

(d) *Ante*, 522.

(e) 3 Taunt. 440.

**M. T. 1856.** must issue a new plaint, and then, on showing due grounds  
*Queen's Bench* to the Court, under the late sections of the Common Law  
**SULLIVAN** Procedure Amendment Act (1856), the Court may remove legal  
**v.** bars; but if the Statute of Limitations would prevent him  
**SULLIVAN.** issuing a new plaint, that is caused by his own neglect  
in not instituting his suit earlier. He must now go to the  
Court of Chancery in the usual way: as the plaint in this  
action issued before the Common Law Procedure Act (1856)  
came into operation, we cannot give the plaintiff any assist-  
ance.

Motion granted, with costs.

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NOTE.—This case having been mentioned on a previous day, and Counsel for the application having stated that no new notice of moving the motion had been served, the CHIEF JUSTICE directed that in this and every other case standing over from Chamber to the Full Court, a notice should be served, of the intention to renew such motion.

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### JOHNSON v. BELL.

Nov. 7, 10.

To a writ of This case came before the Court on demurrer to a defence to a  
revivor of a writ of revivor, issued under the Common Law Procedure Amend-  
judgment of 1819, revived ment Act (1853).  
1819, revived  
in 1842, the  
defendant

pleaded that The writ called on the defendant to appear and show cause why  
there were two the plaintiff should not have execution against the defendant, of a  
judgments of judgment, whereby he, on the 20th of July 1819, in the Court of  
the same date, judgment, whereby he, on the 20th of July 1819, in the Court of  
for the same amount and  
amount and between the same parties, remaining unsatisfied, and that neither of said judgments  
between the same parties, remaining unsatisfied, and that neither of said judgments  
had been revived, it not appearing by the record of the judgment of revivor upon  
which judgment the Court awarded execution; and secondly, defendant pleaded  
that plaintiff had not sued forth the writ of revivor within twenty years after the  
recovery of said judgments, or either of them.—*Held*, that the first defence was bad,  
because it was a parol averment to contravene matter of record.

*Held*, that the second defence was also bad, because the 20th section of the  
Common Law Procedure Act (1853), which says no action shall be brought on a  
judgment, but within twenty years after the cause of such action or recovery of such  
judgment, only applies to actions begun by summons and plaint, and not to writs of  
revivor or proceedings by suggestion.

Queen's Bench, recovered against the defendant the sum of £200, besides £2. 11s. 8d. for costs, and of which sum the plaintiff alleged there remained due and unsatisfied the sum of £184. 12s. 2d. M. T. 1856.

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To this writ, the Statute of Limitations having been pleaded, the plaintiff obtained liberty to amend his writ, by alleging that in Hilary Term 1842, by a certain judgment of revival of the Court of Queen's Bench, grounded on the said judgment, it was considered by the Court that the plaintiff should have execution against the said defendant, of the said sum of £200, and the damages so recovered by the said judgment.

The defence pleaded was, that on said 20th of July 1819, the plaintiff recovered against the defendant two several judgments in this Court, which judgments were the only judgments recovered by the plaintiff against the defendant; and in said Court, and on said day and in said year, were so recovered as of Trinity Term in said year, and were numbered respectively upon the roll 297 and 298, as of said Term in said year, and remained of record unreversed, unsatisfied and not made void; and, by each of said judgments, plaintiff recovered against the defendant a sum of £200, besides £2. 11s. 8d. for costs; as by the records of said Court may appear. It then averred that neither of said judgments had been revived, it not appearing by the record of the judgment of revivor, in said writ of revivor mentioned, upon which of said judgments the Court considered plaintiff should have execution.

The second defence was that plaintiff had not sued forth said writ of revivor within twenty years after the recovery of said judgments, or either of them, or of any judgment in said writ of revivor mentioned or referred to.

Demurrer.—Because it appears by the defence that the judgment of the 20th of July 1819, in said writ of revivor mentioned, remains of record wholly unsatisfied; and that the defence does not allege any matter of fact or law, showing that the plaintiff should not have execution of the said judgment against the defendant; and because the defendant is estopped by the revival from alleging that the judgment of the 20th of July 1819 was

M. T. 1856. not duly recovered or revived by the plaintiff against the defendant.  
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*May and Napier*, in support of the demurrer, were stopped by the Court.

*M'Mechan and J. E. Walsh*, for the defendant.

The defence rests on the 20th section of the Procedure Amendment Act (1853); which enacts, "That all actions for rent, upon an indenture of demise, all actions upon any bond or other specialty, or upon any judgment, statute staple, statute merchant, or recognizance, shall be commenced and sued within twenty years after the cause of such actions or suits, or the recovery of such judgment, but not after." That and the following sections, to the 27th section, form a new code of limitation, applicable to all actions and causes of action. The form of the revival is not that the judgment shall be revived, but that execution may issue on it. By 8 G. 1, c. 4, s. 2 (*Ir.*), a defendant may plead payment as a bar to any proceeding on a judgment more than twenty years old; and payment was to be presumed, unless there had been part payment, acknowledgments in writing, or disability to sue, or unless an action had been commenced for the recovery of the debt. If the plaintiff revived the judgment, or issued a *scire facias*, that was held to be an action for the recovery of the debt, and so the bar of the statute was prevented. Then came 3 & 4 W. 4, c. 27; and by its 4th section it is provided that, "No action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, &c., but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such

"action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment," &c. To bring an action within twenty years after recovery of a judgment is different from bringing it within twenty years after a present right to receive the money secured by the judgment shall have accrued: *Farran v. Ottiwell* (a). But the difficulty raised on that statute cannot arise on the Procedure Act 1853. The writ states the judgment was obtained on the 20th of July 1819, and the 20th section of the Act says, in so many words, no action shall be brought, twenty years after that, upon it. If the Legislature meant twenty years after the revival of the judgment, they would have said so. Exceptions to save the bar of the statute are specified in the following sections, but nothing is said as to revival, which, if it had been intended, is a remarkable omission, considering the conflict of judicial opinion on the previous statute. That statute of 3 & 4 W. 4 is superseded by the Procedure Act, though it be not in terms repealed, because by the present Act a shorter bar is created. It may be argued that though the 20th section be applicable to actions on judgments, it does not affect proceedings on writs of revivor. The Act gives the substance and form of the writ in a schedule, and it is the same as the *scire facias* given by 13 Edw. 1. The defendant is given a day to show cause, and that makes it an action. A *scire facias* is an action, for to it may be pleaded a release of all actions, as a plea in bar: *Co. Litt.*, p. 290 b. If the words of the 20th section, all actions on judgments shall be brought within twenty years, do not include the action of revivor, what do they mean? How can these words be confined to actions of debt on the judgment? The 151st section says, the pleadings and proceedings upon writs of revivor shall be the same as in ordinary actions, which are proceedings by summons and plaint. An extraordinary action must be a proceeding by writ of revivor; but still it is an action within that 20th section. The inclusive sections, from 20 to 27, are a complete code of limitation, and are prefaced thus—"With respect to the period of limitation within which personal actions shall be brought."

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Then sections 148 to 154 inclusive relate to the issuing executions upon judgments, and the 152nd section authorises the defendant to plead payment in bar of the judgment; it is applicable to proceedings by ordinary action as well as revivor, and therefore its operation was extended to other actions as well as to revivor.

Again, we say this judgment has not in fact been revived; and if execution were ordered to issue, the officer would see two judgments, and would be unable to say on which it should issue; and this must have happened in 1842, when the order of revival was had. How can the Court say to which judgment the order is applicable? It being therefore uncertain, it is void. 19 & 20 Vic. c. 97, ss. 10 & 11, in enacting that the absence of parties beyond the seas should not prevent the operation of the bar, recognised the Common Law Procedure Act. as providing the limitation of twenty years for all proceedings upon judgments, whether by action of debt or revivor.

*Napier* replied.

The defendant alleges he ought not to pay one debt, because he owes another; he admits the judgment and the debt due on it, and says, "I owe another debt."—[MOORE, J. He says neither judgment has been revived, because the revivor does not show which of them has been revived.]—A judgment of revival within twenty years keeps the judgment alive, and gives a new present right: *Kelly v. Bodkin* (a). The plaintiff has a settled right, and the Court are called on to displace it. It is said that 8 G. 1 and 3 & 4 W. 4 are repealed; but the Procedure Act, by its 3rd section, saves all existing proceedings, and by no terms is 3 & 4 W. 4 repealed. The plaintiff acquired a new present right to recover this money in 1842, and that right is not abrogated, as the Act that gave it is still in full force. The 20th section of the Procedure Act plainly refers to proceedings by summons and plaint: *Farran v. Beresford* (b); *Farrell v. Gleeson* (c). In *Cocks v. Brewer* (d), it is

(a) 7 Ir. Law Rep. 347.

(b) 10 Cl. & F. 319.

(c) 11 Cl. & F. 702.

(d) 11 M. & W. 56.

said, "The *scire facias* is a *quasi* continuation of a matter of record, in order to have execution thereon." M. T. 1856.  
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*Cur. ad. vult.*

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LEFROY, C. J.

This case comes before the Court on a demurrer to a defence taken to a writ of revivor, issued to revive a judgment obtained against the defendant in 1842.

Nov. 10.

The defendant alleges, in his first defence, that there was another judgment, of the same date and for the same amount, recovered by the plaintiff against the defendant, and that it does not appear upon the roll that there is any entry of revival. His second defence is the Statute of Limitations, inasmuch as the original judgment was had in the year 1819; and if that be the proceeding the writ of revivor seeks to enforce, that would be a good defence.

By the first defence, the defendant seeks by a parol averment to get rid of a matter of record; and it is therefore clearly bad. The writ issued on the revived judgment avers the revival as a matter of record, and what appears by the roll must be decided by the roll itself, and a party cannot be allowed by mere averment to contradict the roll. If he meant to say there was no judgment, he should have pleaded *nul tiel record*.

As to the second defence, the Statute of Limitations. It appears a very novel proposition that the judgment of revival should go for nothing; that the Procedure Amendment Act (1853) has done away with the effect of a judgment of revivor; and that though a party have a valid judgment of revivor, he must go back to the original judgment; and if that be beyond twenty years, the judgment is bad, and no proceeding can be had on it.

It was argued that the Procedure Act had swept away all the old law as to judgments of revivor, and that no party can recover on a judgment unless the revivor be within twenty years after the recovery of the judgment. That argument could only be sustained by mixing together separate and independent things, namely, the proceedings for reviving a judgment, and the manner in which the Statute of Limitations is to be pleaded. The

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Legislature have made enactments for the writ of revivor, and why should they have made any provision for the writ? because the argument is, that no judgment should be revived twenty years after its recovery; why therefore deal with it? or why should the Judges be called on to make rules stating what the affidavit, to ground the order of revival after twenty years, should contain? The argument is rested on the 20th section of the Procedure Act, which provides that, "All actions for rent, upon an indenture of demise, all actions upon any bond or other specialty, or upon any judgment, statute staple, statute merchant or recognizance, shall be commenced and sued within twenty years after the cause of such actions or suits, or the recovery of such judgment, but not after." It might be argued (if necessary) that that section applies to the commencement of an action, and not to proceedings already commenced. But it has been said that the word "action" embraces all the proceedings on a judgment, such as *scire facias* or revivor; that a proceeding by either is an action, and that the proceeding here is an action within the section. A *scire facias* is not for all purposes an action; though it be in the nature of an action, it differs materially from an action. An action could, of old, be only founded on an original writ; a *scire facias* is a judicial writ; and *Lord Coke* says it is in the nature of an action, because it may be pleaded to; therefore, if necessary so to decide, the word "action" in this section is not referrible to a *scire facias*. Where the Legislature intended to include the writ of *scire facias* in its provisions, they use the words, "action or other proceeding." Section 152 of the Procedure Act says, "in any action on a judgment, or in any proceeding by writ of revivor to revive a judgment;" but there are no such words in the 20th section as "other proceeding." This, therefore, might furnish an argument that, in the 20th section, the Legislature did not intend to affect the operation of judgments or suits of *scire facias* in any way. But it is not necessary to rest the case on that ground; for that 20th section itself says that, "All actions, &c., shall be commenced and sued within twenty years after the cause of such actions or suits, or the recovery of such judgment"—what

judgment? It is plain the meaning is, that where a judgment has been revived, it is as it were recovered, and that it is thenceforth to be taken as of the date of its revival. That, prior to the passing of the Procedure Act, such was the meaning, is decided by *Farrell v. Gleeson* and *Farran v. Beresford*. The latter case went off on a point of pleading; but, in the former case, Lord Cottenham says, referring to *Farran v. Beresford*, "In that case, the judgment was of the year 1810. The plaintiff "having died, his representative revived the judgment by *scire facias* in 1817; and the Judges gave their opinion that this "judgment on *scire facias* conferred on the plaintiffs a new right, "within the 3 & 4 W. 4, c. 27, s. 40; and although the case was "disposed of upon a question of defect in pleading, the noble and "learned Lords who attended the hearing of that cause concurred "in the opinion of the Judges." The Lord Chancellor said:—"I "agree with her Majesty's Judges in thinking that in this case "a new right was acquired by the judgment on *scire facias* in "1817." *Farran v. Beresford* decided that a judgment of revivor was the judgment to which the parties must advert in considering the question of the Statute of Limitations; and in *Farrell v. Gleeson*, it was also held that the Statute of Limitations must apply to the last revivor of the original judgment; that the revivor was substantially the original judgment, brought forward to that period, and still subsisting. Now, have the Legislature, by anything in this Act, intimated, in using the word "judgment," that they referred to any other judgment, or to a judgment in any other sense than to the date of the revivor? So far from it, that this very Act, and the rules made in pursuance of it, provide for the very case of a judgment more than twenty years old; and if it be sought to revive it, it is requisite to show that the judgment has been kept alive in other ways; and, if so kept alive, it is the *terminus a quo*.

The writ of revivor is framed in the same terms as the writ of *scire facias*; and what is there to induce us to think that the Legislature intended, when using the same language, that that language should be interpreted differently, from the day this Act

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passed, to what it had been interpreted anterior to its passing? There is nothing in the Act to lead to such an inference, nothing to change the efficacy of the writ of revivor using the same terms as the writ of *scire facias*. We were referred to the Statute of Westminster, giving the writ of *scire facias*; but that statute was passed to remedy the old law, that a party was not to have execution after a year and a day, except by entering on the judgment roll continuances; it was to get rid of that entry of continuances that the statute passed: and to this we would be thrown back, if the argument of the defendant's Counsel were right.

If the Statute of Limitations be pleaded, it must be to the judgment on the writ of revivor in 1842, which was then a valid judgment; and it could not be said, even if this view were wrong, that the Procedure Act is retrospective in operation, so as to deprive the party of the remedy, which he admittedly possessed in 1842, to recover his judgment. The Court had no doubt on the case; but as it was *primæ impressionis*, we thought it right to give it due consideration, and are of opinion that the writ of revivor is a proper writ, that the defences are bad, and that the demurrer must be allowed.

CRAMPTON, J.

The defence raised on the 20th section of the Procedure Act is clearly bad, though the question involved was a most ingenious one, namely, whether that 20th section nullified the benefit a party was entitled to from a judgment of revivor? The question is resolvable into this, whether the word "action" in that section comprehends a writ of revivor? A judgment of revivor is according to the meaning of the term, and does in fact give a new right of execution from the day of its date; the one here was as if the judgment of 1819 had been in 1842. If this were a *scire facias*, would a judgment upon it be a recovery in an action? A *scire facias* is not an action; for the furtherance of justice it is an action for the purpose of pleading, or the continuance of a former action; it is a judicial writ, and a party is allowed to plead to it matter to bar execution. In *Executors of Wright*

v. *Nott* (a), Ashurst, J., says :—"This is not a new action, but "a continuation of the old one; it is only a *scire facias* to revive "the former judgment;" and in *Bac. Ab.* it is said :—"Though "it be a judicial writ, or writ of execution, yet it is so far in "nature of an original, that the defendant may plead to it; and "it is in that respect considered as an action." But this writ is not a *scire facias*, but a writ of revivor; and how does the Procedure Act deal with it? All actions are by that Act to be begun by writ of summons and plaint; is then the revival of a judgment an "action?" How is it to be done? Sometimes by writ of revivor; but not always. It is commenced in a different way than by summons and plaint. The Legislature have thought it right to keep judgments alive by two modes of proceeding—by suggestion on the roll, without any writ (section 150), and by revivor, if the case be not quite plain for the other mode; but either is a totally different thing from a summons and plaint. The words in the 20th section are "actions upon any judgment." I do not stop to inquire whether that means an action on the revived judgment; it is unnecessary to do so; for the Legislature have carefully distinguished between actions on judgments and proceedings to revive a judgment. It appears, from the 150th section, that if the suggestion be entered, it cannot be contravened, and the judgment stands. Then the 151st section says that a party alleging himself to be entitled to execution may sue out a writ of revivor; but the 152nd section removes all doubt; for it says, "In any action on a judgment, or in any proceeding by writ of revivor to revive a judgment," &c., putting them in contrast, and keeping up the distinction between an action and the writ of revivor. The word "action" therefore, in the 20th section, does not include a proceeding by suggestion, or a writ of revivor.

But it is argued that the plaintiff claims by a revivor of a judgment of 1819: and there are two judgments of the same date, for the same amount and between the same parties; and the question is ingeniously put, which of the judgments is revived? It would be curious to hold that because a plaintiff had two judgments

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against the same defendant, for the same amount, he was not to have execution on either; he is to have his execution on whichever writ he revives. There is a difference in the revival roll of judgments and the original roll, and I regret that it is so; it is one of the matters requiring revision; but we are not to deal with it. Here is but one judgment, and the plaintiff on this record is entitled to have execution on that judgment. The demurrer must be allowed.

PERRIN, J., and MOORE, J., concurred.

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LOW v. RUSSELL.

Nov. 2.

This Court will not entertain a motion to amend a *postea*; such application is properly moveable before the Judge who tried the case.

R. ARMSTRONG, on the part of the plaintiff, moved that the *postea* in this cause be amended, by inserting therein an award of sixpence costs to the plaintiff, on the finding upon the second and third issues containing the plea of tender; and that, thereupon, the *postea* so amended may be delivered to the plaintiff's attorney, in order to have judgment marked for the plaintiff in this cause, so that he may be entitled to the general costs of the action.

*Macdonogh*, contra.

This is an application moveable only before the Judge who tried the cause, and this Court will not entertain it: *Newton v. Harland* (a).

*Per Curiam*.

This motion is contrary to the established practice of the Court, and must be refused, with costs. The proper course is to apply to the Judge who tried the case.

(a) 1 Sc. N. B. 503.

M. T. 1856.

Exchequer.

## SPENCER v. THOMPSON.

(Exchequer.)

Nov. 4.

THIS action was for a malicious arrest upon an overmarked writ of execution, tried before the LORD CHIEF BARON and a special jury, Where a creditor, having seized the goods of a

principal debtor in execution, afterwards caused a return of *nulla bona* to be made on the writ of execution, and forbore to sell the goods, though called on by the surety so to do, and then issued a *ca. sa.* against the person of the surety, marked for the full sum due, without deducting therefrom the value of the goods so seized:—*Held*, that this amounted to a voluntary abandonment of the seizure; and that, as the seizure and subsequent abandonment of the goods of the principal operated in Equity as a discharge *pro tanto* of the surety, who was entitled to call upon the creditor to proceed and sell the goods, and to give him credit for the amount realised by such sale, the value of those goods was an equitable deduction, to which the plaintiff should be entitled under the statute of 6 Anne, c. 7.

*Held also*, that an action at Common Law lies for maliciously and without probable cause overmarking the writ of execution under which the debtor is arrested, as the statute of Anne provides no specific remedy for that case, but only for the case of the omission to deliver a proper certificate, or for overcharging the debtor in that certificate.

Plaintiff having deposed in evidence that he wrote a letter about his affairs to the defendant, calling on him to sell the goods so seized, and that he or somebody for him posted it, and evidence having been given that the defendant had held a conversation with a third person, in which he stated that he had been so called upon, and during which conversation he held a letter in his hand, which he did not read, but which he said he had received on the subject:—*Held*, sufficient ground to admit secondary evidence of the letter written by plaintiff (a notice to produce having been served.)

The decree in a Chancery petition matter, in which the plaintiff was petitioner, and the defendant was a respondent as public officer of a Bank, and in which matter the amount of the value of the goods seized by defendant, and the plaintiff's right to that amount, as an equitable deduction, had been determined, being offered in evidence, was objected to, as obtained against the defendant *in autre droit*.—*Held*, same was not *res inter alios acta*, but was admissible against defendant, as he had, *prima facie*, a complete control over the suit as a party thereto (no evidence of limited control having been given.)

*Held also*, that this decree, although made subsequent to the arrest complained of, was evidence at least to prove the value of the goods, which had been ascertained thereby; and that if admissible for any purpose, the exception taken to its reception, being general, should be overruled.

*Semble also*, that the decree would be admissible as the decision of a Court of competent jurisdiction, that a right to an equitable deduction had existed at the time the execution issued.

*Semble*.—A party maliciously arresting another for more than is due cannot be held to have probable cause, by reason of his mere belief that he is warranted by law in so doing.

The relinquishing of the execution against the goods of the principal, and the issuing of execution against the person of the surety, with the motive of serving the principal by injuring the surety, is evidence for the jury on the question of malice.

Letters written by the defendant's solicitor, subsequent to the arrest of the plaintiff, with reference thereto, were *Held* properly receivable as evidence of malice in the arrest; as the *animus* of the defendant is to be inferred by the jury *ex antecedentibus et consequentibus*.

An incomplete finding of the jury on one of the issues in the case was *Held* immaterial, as the admissions on the record and the findings on the other issues showed a sufficient cause of action, although, if the former had stood alone, there should have been a *venire de novo*.



M. T. 1856. at the Nisi Prius Sittings after Trinity Term 1856. The summons  
*Eschequer.*  
and plaint is stated at length in the report of the argument of the  
demurrer in this case (a).  
SPENCER  
v.

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The defence traversed the several allegations in the summons and plaint; and the several issues, with the findings of the jury upon them, will be found following the charge of the learned Judge.

On the trial, Moses Spencer, the plaintiff, proved the execution of the bond mentioned in the summons and plaint, as surety for his brothers, who, in 1850, got into difficulties. That on the 6th of May 1850, the goods of his brothers John and Robert were seized under the executions issued by the Belfast Bank, bearing test respectively the 1st of May, and returnable the 12th of June 1850. That about eight days after, he went to Belfast, with his brother John, about the matter, and saw the defendant, whom John asked what could be done? and defendant said he must pay the money. John said if he got time he would be able to pay; and defendant got into bad humour with witness, but not with John. That defendant then said to witness, "where is your friend Pirrie now, and why does he not come to relieve you out of the hobble?" That he (witness) said, "I do not want any relief, I am able to pay anything that is against me." Defendant then said, "I believe you are a free trader, and Master Moses I will watch you." That Pirrie had been a director of the Northern Bank, with which witness had continued to deal up to that time. That defendant calculated that John's assets could pay eight shillings in the pound to the other creditors, and twenty shillings in the pound to the Belfast Bank; and then defendant and one Mr. Morrow made out some document of composition, and Mr. Morrow put his name to it first, and went with witness and his brother to the different creditors in Belfast, and got some to sign it. That no arrangement had then been entered into for giving time as to the execution. That the Sheriff had taken security for the goods until he should see whether any arrangement could be made at Belfast. That he, with his brother, signed a letter to the Bank, on the 20th of May 1850, stating that they were in treaty with their creditors to effect a composition, and requesting that the Sheriff might not proceed upon the executions until

the 5th of June 1850, and undertaking not to commit any act to prejudice the Bank's position in the meantime. That he went to England to try and arrange his brothers' affairs, and that one creditor, named Reid, stood out and would not sign the composition agreement. That after the letter of the 20th of May, he made no request for further postponement of the sale. That he remembered writing a letter, addressed to the Bank directors, about the executions, but kept no copy of it, and could not tell the date of it, but believed it was after his return from England, where he had gone in May 1850, to arrange his brothers' affairs. That he posted the letter, or some person for him, but would not swear that he posted it himself.

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John Galway was here produced, and deposed that at the time of the composition he was agent for the said creditor, Reid; that in 1850 he went to the Bank several times. Defendant said he was anxious that witness should induce Reid to take the said composition, which he (Galway) refused, as he believed the Spencers could pay twenty shillings in the pound, but said that he would take any composition that the said Bank would take. That the defendant said the said Bank had no necessity to take less than twenty shillings, as they were secured; and that it would be ruinous to the other creditors of the Spencers if defendant should act on the suggestion of Moses, as to selling the goods, as it would take from them the means of paying the creditors eight shillings in the pound. That the defendant said he had been applied to on the subject of their affairs; that defendant then held a letter in his hand, the contents of which he did not read, nor did witness understand. Defendant said, if the wish of Moses was taken to sell the goods, it would take the goods that otherwise would provide for the composition; and said that he had received that letter on the subject: that he (witness) could not say from whom: that defendant said he was applied to to sell the goods, and then had a letter in his hands.

On cross-examination, Galway stated that Moses Spencer was in gaol at the time of the said last-mentioned interview of witness with the defendant.

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*Exchequer.*

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The examination of the plaintiff was then resumed, and he deposed that the contents of said letter which he wrote to the defendant, and the date of which he was unable to recollect, were to sell the goods of his said brothers, and that witness would pay the balance, if any : to which evidence the defendant objected, insisting that no sufficient grounds were laid, and no sufficient facts proved, touching said letter, to entitle the plaintiff to give secondary evidence of its contents : but the evidence was admitted ; and this formed the ground of the first exception.

The plaintiff further deposed that he used to defendant, in Belfast, similar words to those used in said letter ; he would not positively say it was written after he was arrested, it might be about a day or so afterwards ; that he never authorised the Bank to give up the seizure of his brothers' goods ; that he had asked for time until the 5th of June 1850, but no longer ; and that he was put into Lifford gaol about the 15th of June 1850, where he remained twenty-two months. That said Mr. Morrow called on witness in the gaol, and said he would, as a friend, advise witness to take the benefit of the Insolvent Act ; he said he would not do so, for he was solvent, and told Morrow to sell the goods of John and Robert, and he would pay the balance ; that plaintiff's solicitor, by letter of the 4th day of July 1851, requested the consent of the defendant to plaintiff's admission to bail, which was refused by defendant's solicitors (Colhoun & Knox), by letter, dated the 9th day of July 1851.

On cross-examination, the plaintiff deposed that the letter, whereof secondary evidence was given, was written by witness when he was in gaol, and he did not post it himself.

John Spencer was then examined, and deposed that, shortly after the 15th of April 1850, he received from Colhoun & Knox a letter dated the said 15th of April, insisting upon an immediate settlement of the demand of the Bank, and threatening proceedings against witness and his surety, on failure of such settlement ; and witness corroborated the evidence already given by the plaintiff, and his account of the interview of the 18th of May 1850, with the

defendant; and that the plaintiff then said to defendant, "Sell the goods of John and Robert, and I will pay the balance;" and stated that he (witness) received a letter from the defendant, dated the 1st of June 1850, directed to Messrs. J. & R. Spencer, requesting witness to meet one Mr. Hazlett at Derry on Monday next, and stating that the matter had been put into his hands; that he saw the defendant in August 1850 in Belfast, when defendant told him that plaintiff should not get out of gaol unless he took the benefit of the Act for Relief of Insolvent Debtors. That witness said to defendant that plaintiff would not do so, as he had no necessity. That the defendant then said that he would not let him out without paying the money. That witness then said it was a very hard case. That defendant replied, "By G— he may lie there until he rots."

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The next witness for plaintiff, S. L. Crawford, deposed that he received a letter from Messrs. Colhoun & Knox, dated the 29th of November 1850, asking to know upon what terms he wished to obtain the release of plaintiff from prison, and stating they should be most happy to submit them to the Bank. That he did not reply to that letter, but set on foot a negotiation to get the plaintiff released from prison. That on the 4th of July 1851, he wrote to the said Colhoun & Knox, asking them to say definitively whether the Bank would consent to liberate the plaintiff on bail, pending the reference under the direction of the Court of Chancery in the said Chancery proceedings, as mentioned in the plaint. That on the 9th of July 1851, he received a letter in reply, stating that the Bank were not disposed to enter into any negotiation for the liberation of the plaintiff, pending the reference. That, a difficulty having occurred as to the appointment of arbitrators, he received from said Colhoun & Knox a letter dated the 21st of November 1851, stating that, in making their selection of an arbitrator to act for them, the Bank would be guided in a great measure by the person nominated by him, so that both the arbitrators might be persons of the same class in the city. That he accordingly named a Mr. White, who was first rejected by Messrs. Colhoun & Knox, as not being in accordance with a suggestion of the Master in Chancery, that the matter should be referred to two Derry merchants; but that, about

**M. T. 1856.** a week afterwards, they waived this objection, and agreed to accept him. That he afterwards received another letter from Colhoun and Knox, dated the 1st of April 1852, stating that they were sending a draft consent with reference to the release of petitioner from custody. That said draft consent had been sent by him to Colhoun and Knox on the 20th of February previous.

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Then Counsel for the plaintiff, amongst the other proceedings in Chancery, referred to in the summons and plaint, offered in evidence an attested copy of a decretal order of the said Court in the said cause petition matter, dated the 12th of June 1851, and an attested copy of a final decree in the same matter, dated the 15th of June 1853, and which were to the effect stated in the plaint; whereupon the Counsel for the defendant objected severally thereto, insisting that the said decretal order and decree were not, nor was either of them, legal evidence in this suit, and upon the issues aforesaid; but the learned CHIEF BARON held that said copies were legal and admissible evidence upon the issues aforesaid; and this ruling formed the ground of the second exception.

The plaintiff having closed his case, the defendant produced S. J. Crookshank, Under-sheriff of the county of Donegal, who deposed to the issuing of the writs of *fi. fa.*, and seizure thereunder, as proved by plaintiff. That on the 20th of May 1850, he saw the three Spencers and Mr. Morrow in Derry, and by their desire he (witness) extended the time for sale of said goods until the 5th day of June 1850. That he received a letter from said Mr. Morrow, on or about the said 20th of May 1855, authorising him, in compliance with the request of the Spencers in their said letter to the Bank, of that date, to hold over the execution until the 5th of June. That the 10th of June was first fixed on by the Spencers as the time for the postponement; to which he (witness) objecting, as being too near the return day of the writs, the 5th of June was agreed upon. That he wrote to the said Belfast Bank on the 1st day of June 1850, proposing to them, as a means of giving time to the Spencers, to renew the writs then in his possession, with a long return, and stating that this would be the better course, to prevent anything being done before the renewals, and stating also his

readiness to proceed to a sale under the present writs, if so desired. That Mr. Hazlett and Robert Spencer came to him on the 3rd of June 1850, to get the time extended for the sale, and asked him how it could be done. He said the better way would be to send up the writs to Dublin without a return, or, if pressed for a return, to return "*nulla bona*." That his reason for adopting this course was that he thought if he returned "goods on hands," he would be responsible for them. That he received a letter from the defendant, dated the 3rd day of June 1850, stating that they had requested the Spencers and Hazlett to meet witness and arrange what course should be taken, and that it was the desire of the Bank to protract the sale, so as to give full time for a settlement with their creditors, and approving of the renewing the writs as suggested by him. That he sent up the said writs to his Returning-officer for renewal. That there was no return on the said writs when they left him. That the Returning-officer does that on instructions from him (witness). That on the 13th of June 1850, he received six writs by post from his Returning-officer, three against the goods and three against the persons of said three Spencers. That he then laid detainers on John and Robert, who were in custody at the suit of said Reid; and on the 15th of June 1850, he wrote and sent to Mr. Hazlett a letter stating that he had received six executions, and that it would be unpleasant for the Bank if he were to act against both bodies and goods for the same debt. That he received a letter from the defendant, dated the 18th day of June 1850, stating, in reply to his letter to Hazlett, that there had been an error in issuing writs against the bodies, as the Bank had only directed those against the goods, to be renewed as agreed on; and requesting him, if that writ against the body of the plaintiff had not been put in force, to retain it; and that the Bank did not wish the bodies of any of them to be seized, as they were quite aware that they could not take the bodies until by sale of the goods they had ascertained that there was not enough to pay the debt. That he wrote to defendant on the 21st of June 1850, apprising him of the fact of the arrest of plaintiff on the 15th, and expressing his opinion that a discharge now would operate as a payment of the debt. That

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**M. T. 1856.** he received a letter from the defendant, dated the 22nd of June  
*Exchequer.* 1850, as follows :—" Dear Sir.—We have received yours of the 21st,  
**SPENCER** "and in reply, such proceedings are no novelty to us. The matter  
**v.** "stands thus : writs were issued against the goods, and then against  
**THOMPSON.** "the goods and bodies, and whilst you were in possession of the  
 "former, unsold, you seized their bodies. In thus doing, you, as  
 "Sheriff, have already done wrongfully ; our acts are perfectly legal,  
 "and it is for you to get yourself out of the position you now stand  
 "in, and you shall have our full assistance to enable you to do so,  
 "and we shall send down our branch inspector, Mr. Morrow, to  
 "see you."

On cross-examination, he deposed that in the letter to his Returning-officer he stated that he should return "*nulla bona*," and he did so at the express desire of the agent of the said Bank. That he did so to keep himself safe.

The defendant, then being examined, stated that at the said interview on the 18th of May 1850, after hearing the statement of John and Robert's assets, he (witness) sketched out the plan, and dictated to Mr. Morrow the composition agreement, which appeared satisfactory to Moses and John. That he did not assume an angry face to plaintiff. That he did not remember saying to plaintiff that he was "a free trader ;" did not say "I'll watch you." That it was quite possible witness might have said, "would your friend Pirrie assist you now ?" but he did not say so in a taunting way, and he had no jealous feeling towards Pirrie. That he did not procure the Sheriff to return "*nulla bona*" to the said writs, or any of them, but wished him to renew the writs, and left it to him to make his own return. That he gave no directions to issue writs against the bodies of the said Spencers. That he presumed he had heard of the writs before he had heard of the arrest. That he did nothing to cause the plaintiff to be arrested. That the whole amount of the balance was then unpaid. That he had nothing personally to do with it, except as manager of the Bank. That he positively never had any ill-will towards the Messrs. Spencer and the plaintiff, nor expressed any ill-will. That he never used the words, "By G—he may lie there until he rots," nor any words to that effect. That

there was a board of directors of the said Bank, and that all letters were read before the board. That he received a letter from J. and R. Spencer, dated the 8th of June, apprising him of their arrest at Messrs. Reid's suit; and that he wrote to them in reply on the 18th of June, telling them that they should either pay Reid's debt in full, or take the benefit of the Insolvent Act; and that, if they adopted the latter course, the Bank should force a sale of their goods and pay themselves, but recommending however a settlement with Reid if possible.

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On cross-examination, the defendant stated that R. G. Carrick acted as the law agent for the Bank in Dublin, in 1850, and that Carrick got out the executions, and gave them to the Returning-officer of the Sheriff to issue; that Carrick informed him (witness) of what he had done. That the person who acts on behalf of the Belfast Bank in Dublin apprises the Bank of what he does for them. That his impression was, that the Bank had heard of the writs against the plaintiff a day or two before he was arrested. That he knew of plaintiff being in gaol, and of the proceedings in Chancery. That he was anxious that the plaintiff should be discharged; but was advised that, to release him was, in law, to release the debt. The witness then denied the requests to sell the goods, as deposed to by plaintiff, and the receipt of any letter directing such a sale; and denied the use of the words, "If I comply with plaintiff's request, there will be nothing left for the creditors."

H. M. Morrow next deposed that he saw plaintiff, who did not ask him to sell the goods, nor complain that they were not sold. That, if such a letter as the plaintiff spoke of in his evidence, and of which secondary evidence was received, had come to defendant, it would, in the course of business, have come under the cognizance of him (witness) in the discharge of his duty; that he never saw any such letter. That, on the 18th day of May 1850, defendant did not say, "Master Moses, I'll watch you;" that he said, in a jocular way, "Mr. Moses, I believe you are a free trader," and "would your friend Mr. Pirrie assist you now?" but by no means in a taunting manner. That defendant did not say to John Spencer, with an oath, that "plaintiff might rot in gaol."

R. Carrick next deposed that he received a letter from the defend-  
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M. T. 1856. ant, dated 5th of June 1850, directing him to carry out the said  
Exchequer. arrangement by the Sheriff, and got no other instructions, except  
SPENCER what was conveyed by said letter. That witness caused writs to be  
v. issued, of his own idea, in consequence of the said returns of *nulla bona*.  
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On cross-examination, witness stated that he put no name on the writs; that he got a receipt for them from the Returning-officer. That he could not say that he told the Bank what he had done; but thought that he wrote to them, and that the Bank was not aware that the writs of *ca. sa.* were issued.

The defendant then closed his case; and the LORD CHIEF BARON thereupon summed up the evidence, and told the jury that the bond upon which the judgment was obtained had conclusively established that the plaintiff was a surety for John and Robert Spencer, the co-obligors in the bond. That, nevertheless, the plaintiff in the first instance might, upon the judgment, have proceeded against the principals as well as against the sureties, for the full amount of the judgment debt; but that, the defendant, having taken in execution on that judgment, under the writs of *fi. fa.*, the goods of John and Robert Spencer, the principal debtors, was bound to sell them; or, if he abandoned that seizure without the consent of the plaintiff (who was the surety), the defendant was not at liberty afterwards to arrest the plaintiff for the full amount of the debt, and without giving him credit for the value of the goods so seized and abandoned; and that therefore there was not reasonable and probable cause for causing the plaintiff's arrest for the full amount of the debt: and further told and directed the jury, that the award and decree of the Court of Chancery established, as between the parties in this action, what was the value of the goods so seized under the writs of *fi. fa.*, issued against said J. and R. Spencer, to the value of which the defendant was entitled to credit against the judgment debt, in determining the sum for which the writ of *ca. sa.* should be marked. But the LORD CHIEF BARON informed and directed the jury that an action at law does not lie against a person who issues execution on a judgment for more than what is actually due to him upon it, unless he does so with malice; and, with regard to the first issue, that, in order to find for the plaintiff, the jury should be satisfied that the

returns to said writs of *fi. fa.* were made through the instrumentality of the defendant, or with his sanction; and that, as to the first, second, third, fourth and seventh issues, they were to be considered by the jury without reference to the question of malice; but that the question of whether there was or was not malice arose on the other issues: and the LORD CHIEF BARON directed the jury that, if the defendant caused the *ca. sa.* to be issued, or the arrest to be made, in order to shelter the property of John and Robert Spencer, by enforcing payment from the plaintiff of the entire amount of the debt, by means of his arrest, when the amount of the debt or the value of the goods of John and Robert Spencer, so seized, might have been recovered under the writs of *fi. fa.* against those goods, that would be such an indirect motive as would be evidence of malice. And the LORD CHIEF BARON told the jury that the conduct of the defendant, after the arrest, in reference to the plaintiff's continuing in custody, might be considered by the jury, in determining whether the *ca. sa.* had been issued or the arrest had been caused maliciously by the defendant; and that, for this purpose, they were at liberty to consider the letters of Messrs. Colhoun & Knox, written after the arrest, and proved on the trial. And further, that, if it was intended by the defendant that the writs should be renewed, against the goods and not against the bodies (as to which the letter of the 5th of June, and the evidence of Carrick, were material), that would tend to rebut the inference of malice; and that, as to the subsequent detention of the plaintiff—if it arose from the difficulty in which the Bank would have been placed by the plaintiff's discharge from prison, and its real or supposed effect in operating as a release or discharge of the debt—that also was material, in considering whether the subsequent detention was not consistent with the absence of malice.

Counsel for the defendant excepted to the charge of the learned Judge, and insisted that he should tell the jury that there was no evidence to go to them of the want of reasonable or probable cause for the arrest of the plaintiff under the writ of *ca. sa.*, and that such evidence was necessary to support this action: but his Lordship refused so to do; and this formed the ground of the third exception.

The Counsel for the defendant further insisted that, upon the

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whole of the evidence, his Lordship should direct a verdict for the defendant, on the ground that there was no evidence to go to the jury that the defendant maliciously, and without reasonable and probable cause for doing so, caused the said writ of *ca. sa.* to be marked for the sum of £794. 8s. 3d., as in the summons and plaint alleged: but his Lordship refused so to do; and this was the ground of the fourth exception.

And Counsel for defendant further insisted that his Lordship should tell the jury that the right of deduction, to which the plaintiff was decreed to be entitled in said Equity proceedings, founded on the seizure of the goods of John and Robert Spencer, and on the alleged neglect of defendant to sell the same, even without the assent of the plaintiff, was not such an equitable deduction as that the omission to make such deduction was any evidence of malice in the defendant: but his Lordship declined so to do; and this was the ground of the fifth exception.

And Counsel for defendant insisted that his Lordship should tell the jury that there was no evidence that the said writ of *ca. sa.* was overmarked at the time of the arrest of the plaintiff thereunder: but his Lordship refused, and, on the contrary, told the jury that there was such evidence; and this formed the ground of the sixth exception.

And Counsel for defendant insisted that his Lordship should tell the jury that the proceedings and decrees of the Court of Chancery, so received and given in evidence for the plaintiff, were not admissible in evidence for the purpose of showing that credit should have been given, at the time of the arrest of the said plaintiff, for the sum afterwards ascertained, by said proceedings and decrees, to be the value of said goods of the said J. and R. Spencer, so seized in execution: but his Lordship refused; and this formed the ground of the seventh exception.

And Counsel for defendant insisted that his Lordship should tell the jury that the letters of Messrs. Colhoun & Knox, subsequent to the arrest, were no evidence to show malice in the defendant, at the time of issuing or executing the said writ of *ca. sa.*: but his Lordship refused; and this formed the ground of the eighth exception.

The case being then left to the jury, they found the several issues as follow:—

On the first issue, viz., whether the defendant and George T. Mitchell and Thomas G. Batt did, or did either and which of them, cause the Sheriff of Donegal, as in first paragraph of said plaint mentioned, to return to the said several writs of *fi. fa.*, therein mentioned, a return of *nulla bona*, as therein alleged? the jury found, "He did so."

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On the second issue, viz., whether the said defendant and George T. Mitchell and Thomas G. Batt did, or did any or either of them, wilfully neglect to sell the goods of the said John and Robert Spencer, in said paragraph alleged to have been taken in execution, as in the plaint alleged? the jury found, "He did."

On the third issue, viz., whether the said defendant and George T. Mitchell and Thomas G. Batt were, or were any or either, and which of them, called upon by the plaintiff at any time, and when, to sell the said goods of the said John and Robert Spencer, so taken in execution, as in said paragraph alleged? the jury found, "He was called upon to sell the goods some time about the 10th of June and 15th of June 1850."

On the fourth issue, viz., whether the said goods, if sold by the said Sheriff, were sufficient in value to satisfy the said demand of the said Banking Company, either entirely or in part, and to what extent, as in said plaint alleged? the jury found, "The goods were sufficient to satisfy the said demand, to the amount of £698. 19s. 4d."

On the fifth issue, viz., whether the said defendant did, using the names of said G. T. Mitchell and T. G. Batt, or either of them, maliciously, and for the purpose of injuring the plaintiff in his person or freedom, or worldly prospects, or otherwise, cause a writ of *ca. sa.* to be issued and directed to the Sheriff of Donegal, against the body of said plaintiff, for the sum of £794. 8s. 3d., as in said plaint alleged? the jury found, "We are all of opinion that the plaintiff's arrest was so applied by the defendant, and that he was kept in prison, to the injury of his worldly prospects, for the purpose of enforcing payment of the entire demand of £794. 8s. 3d.; but we disagree as to the question whether the defendant originally caused his arrest for the purpose mentioned in the issue."

M. T. 1856. On the sixth issue, viz., whether the said writ of *ca. sa.* was wilfully and maliciously overmarked by the said defendant, as in the summons and plaint alleged? the jury found, "Yes."

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THOMPSON. On the seventh issue, viz., whether the defendant did disregard the position of the plaintiff as surety, and did falsely pretend that plaintiff was a debtor principally bound to the said Banking Company, in manner and form as in the first paragraph of the plaint alleged? the jury found, "Yes."

On the eighth issue, viz., whether the said plaintiff was wilfully and maliciously imprisoned by the defendant, for a greater sum than was really due to the said Banking Company, as in said paragraph alleged? the jury found, "Yes."

*Carson* (with whom was *G. Fitzgibbon*), for the defendant, in support of the exceptions.

As to the first exception, there was no sufficient ground laid for admitting secondary evidence of the contents of the letter: 1 *Taylor on Ev.*, p. 369, &c.; *Shaw v. Markham* (a); *Hetherington v. Kemp* (b); *Hawkins v. Salter* (c). Defendant swore he never read it, and there was not sufficient evidence of its loss, and no evidence of its having been posted. The allegation of the defendant to Galway, that he had been requested to sell the goods, may have had reference to the request sworn to by the plaintiff, before the letter of the 20th of May was written.

Second exception; as to the admission of the decrees in Chancery, these were *res inter alios acta*. The parties to those proceedings in Chancery were the present plaintiff and the Belfast Bank; and the defendant was then a party as the officer of the Bank, which was different from his individual capacity; and a judgment against him in another capacity is not evidence against him here: *Sinclair v. Sinclair* (d).—[PENNEFATHER, B. That was a case of a *prochein ami*, who is not even a nominal plaintiff.]—The same rule holds in the case of a clerk of the trustees of a turnpike road, where he is the nominal

(a) 1 Peake Ca. 221.

(b) 4 Camp. 193.

(c) 4 Bing., O. S., 715.

(d) 13 M. & W. 640.

defendant: *Wormwell v. Hailstone* (a).—[PENNEFATHER, B. Sup-  
posing it necessary to establish certain facts, is not this decree or  
judgment admissible against defendant for that purpose, though  
not to show him personally liable?—he had the power of contro-  
verting those facts, and of examining and cross-examining the  
witnesses.]—He had no power, without the consent of the Bank  
directors, to compromise the suit, or to appeal; therefore, he does  
not come within the definition of a party to the suit: 2 *Phil. Ev.*,  
p. 10; *Robinson's case* (b). In *Kirwan v. Gorman* (c), a promise  
by one of the next-of-kin, before he obtained administration, was  
held a promise by a stranger.

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The nature of the exceptions to the charge is of two kinds:—  
first, that there was no evidence of the execution having been over-  
marked at all; secondly, that there was no evidence of its being  
overmarked without probable cause, and maliciously. *De Medina*  
*v. Grove* (d), and *Churchill v. Siggers* (e), are authorities on the  
law of overmarking executions, as it prevails in England; *i. e.*,  
the Common Law. In this country the statute of *Anne* in-  
troduces an obligation; and the present is a proceeding at Common  
Law for single damages, for the infraction of the duty imposed  
by that statute. If the case were at Common Law, as if that  
statute had not passed, then the enlarging the time for the principal  
debtor would not amount to a payment or satisfaction in part;  
and if not, there was no evidence that the execution was over-  
marked: *Dyke v. Mercer* (f), recognised in *Clark v. Withers* (g).  
The plaintiff was not discharged as surety, by time having been given  
to the principal: *Davey v. Prendergrass* (h); *Pole v. Ford* (i); *Peel*  
*v. Tatlock* (k). When the statute imposes a particular duty, and pre-  
scribes a specific remedy, that remedy must be followed, and  
none other: *Couch v. Steel* (l); *Com. Dig., Action upon Stat., F.*  
—[PIGOT, C. B. I have constantly known actions brought at Law,

(a) 6 Bing. 668.

(c) 9 Ir. Eq. Rep. 154.

(e) 3 El. & Bl. 938.

(g) 2 Ld. Ray. 1072.

(i) 2 Chit. 125.

(b) 5 Rep. 32 b.

(d) 10 Q. B. 152.

(f) 2 Show. Cas. 359.

(h) 5 B. & Ald. 187.

(k) 1 Bos. & P. 419.

(l) 3 El. & Bl. 402.

**M. T. 1856.** upon the case, for single damages, for the infraction of the duty imposed by the statute.]—If then he proceeds thus at Common Law, the defendant has not violated the duty imposed by the Act, as the deductions which plaintiff claimed are not equitable deductions within the Act. Some liquidated sum should be named as the equitable deduction; but this is merely an unliquidated equity: *Kidd v. Cusack* (a). In *Mills v. Nerney* (b), it was held that there is a difference between the case of a payment before judgment by default, and one on bond and warrant. The defendant must be shown clearly to have wilfully and fraudulently withheld the credits: *Carmichael v. W. & L. Railway Co.* (c). These are all cases on the statute of *Anne*; and in those cases the deductions claimed were on account of certain fixed sums which had been paid before judgment; here there is no part payment, nor equitable deduction, but merely an unliquidated equity. The decree in Chancery did not liquidate the amount, as that was after the marking of judgment.

There is no evidence that the defendant acted maliciously, and without reasonable or probable cause. *Spencer v. Thompson* (d) was decided on demurrer, where the facts stated in the plaint were admitted by the demurrer, and they were held to amount to an averment of want of probable cause. But on the evidence given actually in the case, this want of probable cause does not appear, if the secondary evidence of Moses Spencer's letter be excluded; and even admitting that letter, there is no evidence that it reached the defendant before the 12th of June. The day of arrest was the 15th of June, and the action is brought for overmarking execution on the 12th.—[PRIGOR, C. B. There is an allegation of overmarking execution, and then of an arrest for that overmarked sum; and although the execution may have been overmarked on the 12th, yet that would not exculpate the arrest on the 15th, if the latter was malicious. The direction to the jury on this point was in accordance with this.]—The conduct of a party, at a late period of the case, is a material circumstance, from which his motives at an earlier period may be inferred,

(a) Sm. &amp; Bat. 63.

(b) Cooke, &amp; AL 81.

(c) 13 Ir. Law Rep. 313.

(d) 4 Ir. Com. Law. Rep. 521.

and those motives are important to be considered, as constituting want of probable cause: *Broad v. Ham* (a); *Churchill v. Siggers* (b): and here the conduct of the defendant displaces the malice imputed.

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As to the eighth exception; the letters to Colhoun & Knox, as far as regards what they contain, may be evidence against the Bank; yet, to be evidence of malice against the public officer, they should be shown to have been written by his authority.

*W. Allen* and *F. Macdonogh*, contra.

On the first point, the plaintiff proved that he remembered writing the letter after returning from England, and that it was sent; and Galway proved that, whilst speaking of the plaintiff's wish to sell the goods, defendant held a letter in his hand, which he said he had received on the subject. This conversation is not denied by the defendant; and notice was given afterwards to him to produce the letter.

The plaintiff was a surety, not a co-obligor, which distinguishes this case from *Dyke v. Mercer*. The proceedings in Chancery were adduced to prove that the defendant knew the debt was not all due, and to prove the value of the goods, which it was impossible for plaintiff to know; equitable deductions are those which it is in the power of the parties to know. With respect to the evidence of malice, we have a right to look at all the circumstances before and after the 15th of June. The evidence of the interview on the 18th of May shows the commencement of the defendant's hostile feelings: he said, "I believe you are a free trader, and I'll watch you;" and afterwards, when an application was made to him to let the plaintiff out of prison, he said, "he might rot in gaol."—[GREENE, B. It is impossible to say there was no evidence of malice.]—Carrick had written to the Bank, and they had time enough to stop the arrest.

The want of probable cause is not rested solely on the letter of which secondary evidence was given, as it was the defendant's duty to sell the goods. This is a clear case of overmarking execution.

(a) 5 Bing., N. C., 725.  
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(b) 3 El. & Bl. 938.  
70 L



M. T. 1856. Equitable deductions are to be allowed "out of the sum for which the judgment is given." The party knew what was due in good conscience. The drawer of a bill is not discharged by an agreement to give time to the acceptor, if he consented to it: *Theob. Principal & Surety*, p. 183. In *Mayhew v. Crickett* (a), a creditor whose debt was secured by a warrant of attorney, and who received promissory notes from the debtor and two sureties, entered judgment and issued execution against the debtor, which he afterwards withdrew, and he was held to have discharged the sureties. The Lord Chancellor there says:—"The second ground was that the defendants, by releasing the execution, had relinquished their remedy, at least *pro tanto*. I always understood that if a creditor takes out execution against the principal debtor, and waives it, he discharges the sureties, on an obvious principle, which prevails both in Courts of Law and in Courts of Equity." The surety becomes discharged by the discharge of the principal debtor: *Theob. Principal & Surety*, p. 176. *Jones v. Nicolls* (b) shows that the defendant is liable here for the arrest. In that case the defendant was held liable, in an action for maliciously arresting the plaintiff and taking him in execution at the defendant's suit, although he was so arrested at the instance of the defendant's attorney and without the knowledge or assent of the defendant. As the evidence of want of probable cause is of a negative nature, very slight evidence will be sufficient: *Cotton v. James* (c); 2 *Starkie on Evidence*, pp. 680, 684.

*G. Fitzgibbon*, in reply.

The plaintiff must recover *secundum allegata et probata*. Now the allegations of the plaint are not borne out by the finding of the jury on the fifth issue, that the arrest was maliciously applied by the defendant. The fact of a malicious arrest is not found by them. This defect can only be cured by a *venire de novo*.—[GREENE, B. There is a question then whether some of the other findings do not amount to a finding upon that

(a) 2 Swanst. 185.

(b) 3 Moore & P. 12.

(c) 1 B. & Ad. 133.

point?]

—If the fact was that the plaintiff was arrested, but not by the means of the defendant, who, however, after the arrest, kept him in custody, this action could not be maintained. The finding of the jury on the last issue (eighth) is inconsistent with the finding on the fifth. There is one whole allegation here, which cannot be split up into several, and judgment on the whole record cannot be given, from the finding on one fact picked out of the case. The cause of complaint here, from beginning to end, is the overmarking of the execution.

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The presumption of law is in favour of a person who sues out a writ having probable cause for so doing; and this throws the *onus* of the proof of want of probable cause on the plaintiff. Malice may be inferred from the want of probable cause, as a party who has no hope of benefiting himself can only wish to injure his antagonist; but, on the other hand, want of probable cause cannot be inferred from malice. The forbearance to sell was by the plaintiff's own expressed consent.

With respect to giving secondary evidence of the plaintiff's letter, there is no evidence that it ever came to the defendant's hands.—[GREENE, B. The Judge is the person who is to decide on whether the facts exist which are sufficient to entitle him to give secondary evidence: the question is not to go to the jury.]—Giving a letter to a bell-man would not be sufficient evidence of posting.—[PENNEFATHER, B. With respect to the question arising on the fifth issue, and the finding thereon, it appears to me that it was incumbent on the defendant, if he thought the plaintiff could not maintain his right to damages on the issue so framed, to have noticed it at the time, and to have called upon the Judge, before the jury retired, to tell them that they should not assess any damages, unless they found that issue entirely for the plaintiff; and, if the Judge refused, then to take an exception. As the matter is now, a difficulty is thrown on us, of seeing whether those issues which were found for the plaintiff warrant the assessment of damages.]—The absence of probable cause was a pure question of law for the Judge; and the law is that the defendant will be protected if he act under the opinion of Counsel, although that opinion be erroneous: *Ravenga v.*

M. T. 1856. *Macintosh* (a).—[PIGOT, C. B. I am not satisfied that your proposition is established by that case; it was a *Nisi Prius* case, in which it was left to the jury to say, whether the defendant had acted *bona fide* upon the opinion of his legal adviser. It was rather a question for the purpose of showing malice than the want of probable cause. The CHIEF BARON here referred also to *Haddrick v. Heslop* (b).]—The knowledge or belief of the party at the time is what must be judged of here. Similar questions often arise in cases between master and servant; in which it is held that, though a good and reasonable cause for the allegation in the discharge actually exists at the time of giving it, yet that cannot avail the master if he did not know it at the time: *Snow v. Allen* (c); *Turner v. Ambler* (d).—[PIGOT, C. B. The converse of the proposition established by *Turner v. Ambler* is, that if there be no reasonable or probable cause for the prosecution, but the defendant believes at the time that there is, then he will be protected. I do not think this converse is established by the authorities.—PENNEFATHER, B. Is there any difference between the assignment of goods for payment of debts, and the taking them in execution, with respect to the defendant's right of issuing a *ca. sa.*?]—In case of an assignment, the defendant would have received goods by his own act of acceptance in part satisfaction at a valued price, and would have to give credit as for a payment.—[PENNEFATHER, B. Suppose the value of the goods not ascertained, and the debtor to say, I have certain goods, let them go *pro tanto*.]—That is a conclusive act of the creditor, by his acceptance; but if they were deposited merely as a pledge, the creditor would be entitled to issue a *ca. sa.*

In *Churchill v. Siggers* (e), the statement of facts, and an averment of acceptance, were admitted by demurrer. The omission of the necessary averment of want of probable cause is sufficient ground for arresting the judgment: *Scheibel v. Fairbairn* (f); *Saxon v. Castles* (g); *De Medina v. Grove* (h). In the last case, the de-

(a) 4 Dow. &amp; Ry. 187.

(b) 12 Q. B. 267.

(c) 1 Stark. 502.

(d) 10 Q. B. 252.

(e) *Ubi sup.*

(f) 1 Bos. &amp; P. 388.

(g) 6 Ad. &amp; E. 652.

(h) 17 Law Jour., Q. B., 321; S. C., 10 Q. B. 152.

claration stated that the defendant well knew the premises; *i. e.*, that he knew of the payment in part satisfaction of the demand. Although malice might be inferred from this fact, yet the judgment was arrested, as malice was not expressly alleged.

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The mere giving indulgence to the principal, after seizure of his goods, will not by itself discharge the surety. The creditor must bind himself not to proceed, or do something to injure the surety: *Peel v. Tatlock (a)*; *Pole v. Ford (b)*. The defendant is not bound to know the law, where it is so undecided. Might he not raise the question without exposing himself to this action? This is a case *primæ impressionis*.—[GREENE, B. The question here is very much as to what are the legal rights of the creditor after having issued a *fi. fa.* against the goods of the principal debtor, with respect to withdrawing that execution and proceeding against the person of the surety? If he have a right to do so, he is not to be made liable in an action, even although he may act with malice.]—He has a right to make his election, by withdrawing execution and proceeding against the surety's person; and the surety is not by that discharged, as the rule with respect to the discharge of the surety, by withdrawing execution without his consent, does not apply *after judgment*: *Pole v. Ford*.—[PIGOT, C. B. A Court of Law cannot, it is true, look behind the judgment; but if we act on the statute of *Anne*, that gives the sureties a right, founded on the equitable obligations of the creditors; and if the creditor, by issuing execution against the principal, and then withdrawing it, would have discharged the surety in Equity, it cannot be argued that, because there was a judgment, the equitable obligation is changed.]

Counsel also cited *Purdon v. Purdon (c)*.

*Cur. ad. vult.*

PIGOT, C. B.

The arguments in this case have been applied to establish, first, that judgment ought to be arrested; or, secondly, that there ought to be a *venire de novo*, either because of the defective finding of the

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(a) 2 Swanst. 185.

(b) *Ubi sup.*

(c) 1 Huds. & Br. 229.

M. T. 1856. jury on the fifth issue, or because the exceptions, or some of them, ought to be allowed.

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THOMPSON. First.—This Court has already decided, on demurrer, that the count or paragraph of the plaint, on which the trial was had, sufficiently states a good cause of action. The case was argued and determined at a Sitting in Banc, by my learned Brethren, during the same Sittings at Nisi Prius after Term, at which the issues in fact were tried before me. The plaint is set forth in the report of the case, 4 *Ir. Law Rep.* p. 514. I entirely concur in the judgment of the Court, and in the reasons given for it by BARON PENNEFATHER. The same reasons which sustained this plaint upon general demurrer must uphold it on an application to arrest the judgment. Upon that application, every fact stated in the plaint must be taken as established, either by admissions in pleadings, or by finding of the jury, except the matters not found in the fifth issue; and if these be material, the result would be, not an arrest of judgment, but a *venire de novo*.

In dealing with the application to arrest the judgment, I should content myself with merely referring to what fell from the Court on the former occasion, but for an argument which was urged before us, and which does not appear (at least from the report of the case) to have been advanced on that occasion. That argument is, that the 2nd section of the statute 6 *Annæ* gives a particular remedy, by a proceeding for treble damages, and that this action cannot be sustained, since it does not pursue the form of remedy there prescribed.

It is undoubtedly a rule that, where a statute creates a duty, and an individual aggrieved by its violation sues for reparation for that wrong, if the statute provides a particular remedy for that purpose, such remedy, and no other, must be applied. It is needless to refer to the authorities; several of them are collected in *Couch v. Steel* (a); in which the rule was recognised, though it was there held not to apply. In my opinion, it is not applicable to the case now before us.

By the 1st section of the statute, the creditor is bound to lodge,

(a) 3 Ellis & Black, 402.

by himself or his attorney, at the time when the writ of execution shall be demanded, in the office from which it is to issue, a certificate, "containing such sum" as the creditor "demands and insists" "to be *in good conscience* due to him, after all *equitable* deductions "that ought to be made out of the sum for which the said judgment "is given." That certificate "shall be filed in the office;"—"the sum "contained in it shall be entered in the book where the executions "are entered; and also on the foot of the writ of execution that "shall issue;" and that entry is to regulate the amount for which the execution is to be executed: the statute prohibiting, in the 1st section, the Sheriff or other officer from levying any greater sum, and from taking fees for any greater sum "than is so entered at foot of the writ;" and enacting, that "no execution shall be "executed, at the foot of which such entry shall not be made as is "aforesaid."

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The effect of the 1st section is, to entitle the debtor, not only to a deduction, from the sum for which the judgment was obtained, of all payments which have been actually made and appropriated by the creditor in discharge of it, but to all deductions which, equitably and in good conscience, ought to be made by the creditor out of that sum. The 1st section prescribes no form of remedy for the violation of its provisions; but it imposes upon the creditor a plain and distinctly defined duty, and creates, in the debtor, a correlative right: and, when that is done, by an Act of Parliament, the law gives to the party injured by the violation of the duty an action of damages against the doer of the wrong, unless some other provision is made, abridging or controlling that right. In England, it has been held, that, at Common Law, a plaintiff who causes a writ of execution to be executed for a larger sum than he knows to be really due, and does so maliciously, is liable to an action at the suit of the party aggrieved. Lord Campbell, in *Churchill v. Siggers* (a), states, with great force and clearness, the principle on which such an action is sustainable. He treats the party who so acts as "putting in force the process of the law, maliciously and without any reasonable or probable cause;" and he lays it down

(a) 3 ELL. & BL. 937.

M. T. 1856. that, "if thereby another is prejudiced in property or person, there  
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 THOMPSON. "is that conjunction of injury and loss which is the foundation of  
 "an action on the case." In Ireland, the statute of 6 *Anne*, c. 7,  
 in effect, does two things; first, it enacts that certain forms shall  
 be observed by every creditor who issues execution on a judgment;  
 secondly, it establishes and defines certain rights in the debtor, by  
 making those provisions for his protection. It provides, that the  
 creditor, issuing an execution, shall lodge a certificate, specifying  
 the sum which he demands, after all deductions which, equitably  
 and in good conscience, he ought to make in favour of the debtor;  
 that that sum shall be entered in a book, and also at foot of the writ  
 of execution; that the Sheriff or other officer shall not levy more  
 than the amount so entered; and that no execution shall be exe-  
 cuted, at the foot of which such entry shall not be made. But it  
 also, by those very provisions, establishes as part of the law which  
 regulates the relation of creditor and debtor by judgment, that it is  
 the duty of the creditor not to use the process of execution for  
 the recovery of more than equitably and in good conscience is due.  
 That duty may be violated, although a certificate properly marked  
 has been lodged, and although an attested copy of such certificate  
 has been delivered to the Sheriff, together with the execution. If  
 the creditor causes the writ to be overmarked, by entering a sum  
 greater than that specified in the certificate, if he imprisons the  
 debtor, under a writ of *capias ad satisfaciendum*, for more than  
 is really due, although the sum really due was contained in the  
 certificate, he violates the duty which the 1st section prescribes.  
 For these acts the 2nd section prescribes no specific remedy;  
 for it gives treble damages in two cases only—that of the omission  
 to deliver an attested copy of the certificate, together with the writ  
 of execution, and that of wilfully, fraudulently, and maliciously,  
 overcharging the debtor *in the certificate*. The plaintiff, in the  
 present case, does not complain of either of the matters for which  
 the action for treble damages is given by the 2nd section. It,  
 in effect, complains of overmarking, not the certificate, but the writ;  
 and it complains of causing the arrest and imprisonment for  
 more than was equitably and in good conscience due. It is

in my judgment perfectly clear, that, for those acts, done maliciously and without probable cause, an action is sustainable, notwithstanding the specific remedy for other acts, by which a similar wrong might be contrived and inflicted, given by the 2nd section.

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Upon the argument before us, of the general question which was raised upon the record, and on which, in effect, the Court, as I have said, decided on the former occasion, we were strongly pressed with this topic, viz., that the statute of *Anne* prescribes only the deduction of sums liquidated and ascertained; that the value of the goods of John and Robert Spencer, seized under the writs of *feri facias* and abandoned by the defendant, was not ascertained at the time when the writ of *capias ad satisfaciendum* issued, under which the present plaintiff was arrested; and that therefore this was not an equitable deduction under the Act of Parliament. The answer to this argument is plain and obvious. If it was the defendant's duty, under the statute, to give to the plaintiff credit for the value of the goods, had that value been realised by a sale before the writ of execution against the plaintiff was issued, and if, moreover, the plaintiff, irrespectively of the statute, had a right, whether at Common Law or in Equity, to have this done, and the defendant purposely and maliciously abstained from doing it, with the very object of not so applying the amount of the goods, there he dealt with all the three processes of law, those against John and Robert Spencer, and that against the plaintiff, for the purpose of withholding, to the plaintiff's prejudice, the equitable deduction to which the plaintiff had a right; and to hold that he was not liable to an action, for that cause, would be to give him the advantage of his own deliberate and intended wrong. It is material, as to this argument, to observe, that the writs of *feri facias* were returned before the writ of *capias* was issued; so that if the goods had not been voluntarily abandoned, the amount to be deducted would have been ascertained before the issuing of the writ of *capias*. Now, of the right of the plaintiff to have the goods sold, upon the statements in this plaint, no ground for doubt exists. The plaint states that the plaintiff, the surety, called upon the defendant, the creditor, to sell the goods of the principals, seized under execution at the



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suit of the defendant, upon a judgment to secure the debt for which the plaintiff was answerable, and that nevertheless the defendant forbore to sell those goods, and abandoned the seizure. In Equity this was a discharge, *pro tanto*, of the surety, and the deduction of the value of the goods was therefore, in that view, an equitable deduction. The right of the surety has been, in some of the cases, laid down even more largely; and it has been said, that if the creditor once proceeds to execution, he is bound not to abandon it without the consent of the surety, even without the surety's call upon him to proceed. But it is perfectly clear that, if he be required by the surety to proceed, he is bound to do so. In a recent case, *Newton v. Charlton* (a), Vice-Chancellor Kindersly made an able and elaborate review of the authorities, including some of those which were cited on the former argument in this case. He refers to Lord Eldon's doctrine in *Wright v. Simpson* (b):—"If the obligee begins "to sue the principal, and afterwards gives time, there the surety "has the benefit of it, and it is his business to see after the principal "person, and not that of the creditor." The Vice-Chancellor says, "Lord Eldon puts the case of a creditor beginning to sue and "ceasing. That comes rather nearer to the case in question" (the case before the Vice-Chancellor) "than any other. If the creditor "begins to sue and ceases, then the surety is released." He then says, that in another case before Lord Eldon (which however I have not been able to find), where *Wright v. Simpson* was cited before him as to what he said in that respect, Lord Eldon stated, "I said "that, because, if you begin to sue, you are only doing what the "surety could force you to do by the process of indemnifying you; "if you take that on yourself voluntarily, you are bound to follow it "out; then you are liable in respect of *laches* subsequent to the "contract." There was therefore a right, at least in Equity, in the plaintiff, to have those goods sold, and the amount of their proceeds deducted from the amount due upon the judgment; in other words, the plaintiff, being released *pro tanto* in Equity, was entitled to an equitable deduction to that amount, from the sum due on the judgment; and the duty imposed by the Act of Parliament was

(a) 2 Drew. 338.

(b) 6 Ves. 734.

violated by what we must, on this record, assume to have been a malicious execution of the process, which, to the extent of the excess, was enforced without probable cause.

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Secondly.—The next question is, whether there ought to be a *venire de novo*, on account of the manner in which the jury have dealt with the fifth issue? That issue is founded on an allegation in the plaint, traversed by one of the defences. It is in these words:—  
 “Whether the said defendant did, using the names of said G. T. Mitchell and T. G. Batt, or either of them, maliciously, and for the purpose of injuring the plaintiff in his person or freedom, or worldly prospects or otherwise, cause a writ of *ca. sa.* to be issued or directed to the Sheriff of Donegal, against the body of the plaintiff, for the sum of £794. 8s. 3d., as in said plaint alleged?”  
 The jury find—“We are all of opinion that the plaintiff’s arrest was so applied by the defendant, and that he was kept in prison, to the injury of his worldly prospects, for the purpose of enforcing payment of the entire demand of £794. 8s. 3d. But we disagree as to the question whether the defendant originally caused his arrest for the purpose mentioned in the issue.” I confess I have had some difficulty as to this part of the case. Upon the question whether the defendant maliciously, and for the imputed purpose, caused a writ of *capias* to be issued to the Sheriff against the defendant’s body, for the sum of £794. 8s. 3d., the jury do not return any finding. Their finding is, that the arrest of the plaintiff was applied by the defendant for the purpose imputed in the issue, and that he was kept in prison with the results contemplated in that purpose, in order to enforce payment of the sum stated in the issue; and the question on which they state that they disagree is not any question comprised in the terms of the issue, but whether the defendant originally *caused the arrest*, for the imputed purpose? The issue did not inquire whether the defendant “*caused the arrest*,” but whether he did an act preliminary to the arrest, namely, cause the writ of *capias* to issue, and did *that* with the purpose imputed?

If, therefore, this were the only issue which was applied to connect the defendant with the alleged cause of complaint set forth in the

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Further; under the sixth, seventh and eighth issues, the following allegations of the plaint are found by the jury:—"That the said writ of *capias ad satisfaciendum* was wilfully and maliciously overmarked by the defendant; he, the defendant, disregarding the plaintiff's position as surety, and falsely pretending that the plaintiff was principal debtor to the said Bank, and the said plaintiff was, by the said defendant, wilfully and maliciously imprisoned for a greater sum than was really due by the said plaintiff, on foot of his said liability, as surety to the said Bank." All the other issues are found for the plaintiff. All the allegations, not comprised in the issues, stand admitted on the record. And the jury find damages accordingly. The result is: that, on the admissions and findings, facts are found which gave to the plaintiff the right to the benefit of the seizure and abandonment of the goods of the principal debtors, to the extent of their value, in reduction of the demand upon the judgment: that, nevertheless, the defendant was arrested by the Sheriff, under a writ of *capias ad satisfaciendum*, marked for the sum of £794. 8s. 3d., the full amount of the demand of the Bank: that the *capias* was maliciously overmarked by the defendant, disregarding the plaintiff's position as surety, and falsely pretending that the plaintiff was principal debtor to the Bank; and it was further found, that the plaintiff was by the defendant wilfully and maliciously imprisoned for a greater sum than was really due by the plaintiff, on foot of his liability as surety on the bond. These facts appear to me to show a sufficient cause of action; and that being so,

the fifth issue, whether there be no finding upon it at all, or there be only a partial finding upon it, ought to be treated as immaterial. For even though it were found by the jury that the defendant did not cause the writ to be issued, yet if he wilfully and maliciously overmarked the writ, if the plaintiff was arrested under it, and if he was imprisoned by the defendant for a sum greater than was really due by the plaintiff as surety, the plaintiff would, in my judgment, be entitled to judgment, notwithstanding such finding. The defendant would be answerable for so dealing with the writ, by whomsoever it was issued; and whether, *at the time of issuing it*, the defendant did or did not intend to use it for the purpose imputed in the plaint and in the fifth issue. The writ, for aught that appears on this record, may have been overmarked after it was issued.

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Thirdly.—Next, as to the exceptions. There are two to the reception of evidence. The first is as to the reception of secondary evidence of the letter which the plaintiff swore that he wrote to the defendant, addressed to the directors of the Belfast Banking Company, of which the defendant was one. The plaintiff stated, that he would not swear that he posted the letter, but that he posted it, or some one for him; that he knew he wrote the letter and sent it. Upon this evidence being given, the contents of the letter not being then received in proof, Mr. John Galway was produced as a witness; and he stated, “that in a conversation which he had with the defendant, the defendant said, ‘that he had been applied to on the subject “of the affairs of the Spencers.’ That the defendant then held “a letter in his hand, the contents of which the witness did not “read, nor did he understand. ‘But that if the wish of Moses was ““taken to sell the goods, it would take the goods that otherwise ““would provide the composition for the creditors.’ He said, ‘he ““had received that letter on the subject.’” Witness would not say from whom, whether from Moses or the brothers. “He, the defendant said ‘he was applied to to sell the goods;’ he then held the “letter in his hand.” The plaintiff was re-examined, and stated that the contents of the letter were “to sell the goods of his brother, and that witness would pay the balance, if any:” and to this

M. T. 1856. evidence of the contents of the letter the defendant's Counsel excepted, on the ground that a foundation was not laid for the reception of secondary evidence. It appears to me that this evidence was properly received. There are later cases than those which were cited: *Hawkins v. Rutt* (a), and *Hetherington v. Kemp* (b); see *Ward v. Lord Londesborough* (c); *Shilbeck v. Garbet* (d). It is unnecessary to discuss these authorities, because they apply to the state of the evidence before Galway was examined. His evidence was persuasive to show that the defendant had received the letter; and if a question had arisen, not for the Judge, but for a jury, as to the receipt of it, that evidence would have warranted them, in the absence of contradictory proof by the defendant, in inferring that the letter had reached him. The defendant was afterwards examined, and stated that he received no letter from the plaintiff prior to the arrest, save one, the contents of which did not correspond with what the plaintiff stated of the letter in controversy. But the question to be determined on this exception is, whether, at the stage of the case at which the secondary evidence was offered, it ought to have been rejected? A different question would have arisen if the defendant had, at that stage, been examined, or his evidence had been tendered to prove that he had not received the letter. I am very clearly of opinion that this exception ought to be overruled.

The next exception was to the reception of the decree and other proceedings in the petition matter in the Court of Chancery. The parties to that matter were the present plaintiff, as petitioner, and the present defendant, and his two co-obligees of the bond on which the judgments in question were obtained, as respondents. In that matter, the right of the plaintiff to the deduction which was the subject of controversy in this action, and the amount of the value of the goods for which that deduction should be made, was the subject of adjudication. It was contended that, because the defendant and the other respondents were public officers of the Bank, and were so described in the petition, it was a pro-

(a) 1 Peake, 248.

(b) 4 Camp. 193.

(c) 12 C. B. 252.

(d) 7 Q. B. 848.

ceeding against them *in autre droit*, and that what was done in it was not proveable in the present action, in which the defendant is sued personally, for a *tort*, in his individual capacity. It is impossible to maintain such an objection. The defendant's conduct is complained of in the present action, on the ground of his having used the judgment, and the execution issued upon it, to enforce more than ought to have been demanded upon it by him and his co-obligees. Between the plaintiff, on the one side, and the defendant and those co-obligees, on the other, the question, whether the defendant and his co-obligees were entitled to demand what in fact was demanded and enforced upon the judgment and execution, was litigated and determined. And it is impossible to separate the defendant's capacity of director of the Bank, in which he was a co-plaintiff in the judgment and execution, from his individual capacity in which, to the present plaintiff's wrong (if he be at all liable in this action), he used the execution to recover more than was equitably and in good conscience recoverable on the judgment. The foundation for the argument therefore fails. But independently of the connection between those two capacities, existing in the very nature of the proceedings complained of in this action, I should find it very difficult to hold that the subject of this evidence could, in any view, be properly considered as *res inter alios acta*. The defendant, *prima facie*, was entitled in the Chancery proceeding to defend that proceeding, to cross-examine witnesses and to appeal from the decision. Whether proof could be given that, though named as a respondent, he was not a *dominus litis*, and that others in fact conducted and controlled the defence, is a question not now before us. But in the absence of anything appearing to the contrary, either on the face of the proceedings themselves, or by any other evidence, he must be taken to have been a party, with all the plenary powers of resistance, which make the proceedings evidence against him in another suit, in which he is litigating on the same subject-matter with the same party.

The reception to this evidence was objected to on another ground, namely, that the proceedings in the Court of Chancery were only evidence to establish an equitable right to a deduction, not ascer-

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tained at the time when the execution complained of was executed, and therefore not within the statute of 6 *Annæ*, c. 7. In our view of this ground of objection, it only presents, in another form, the argument in support of the application to arrest the judgment which I have already disposed of. It was, however, further supported by the argument that, being an adjudication of a Court of Equity, subsequent to the act complained of in this action, it cannot be applied towards showing a pre-existing right to a deduction from the amount due on the judgment—that is, a right existing at the time of the execution, which was long before the adjudication. Regarded even in this view, I am not satisfied that the adjudication, made before the bringing of this action, was not admissible to establish that a Court of competent jurisdiction had determined, between those parties, that a right to an equitable deduction existed when the execution was issued. But, at all events, the proceedings were admissible to prove the value of the goods, which were ascertained by an award of arbitrators made in the Chancery matter, with the sanction of the Court of Chancery; and to establish the value of those goods was a necessary part of the plaintiff's proofs in this action. If the proceedings were admissible for any purpose, the exceptions taken generally to the reception of them must be overruled, according to the rule applied by the House of Lords, in the case of *The Irish Society v. The Bishop of Derry* (a).

The remaining exceptions are exceptions to the charge. The first, second and fourth exceptions involve, in effect, the same question which was argued in support of the application to arrest the judgment. They are founded on the proposition that there was not that in the case which warranted the direction to the jury as to probable cause. In substance that direction was, that the defendant, having taken in execution, on the judgment against the principal debtors, the goods of those principals, was bound to sell them; or, if he abandoned that seizure, without the consent of the plaintiff, the surety, the defendant was not afterwards at liberty to arrest the plaintiff for the full amount of the debt,

(a) 12 CL. & Fin. 641.

and without giving him credit for the value of the goods so seized and abandoned; and therefore there was not probable cause for causing the plaintiff's arrest for the full amount of the debt. The defendant's Counsel objected to this charge, and, in effect, required, on the first exception, that the jury should be told that there was no evidence to go to them of the want of reasonable or probable cause for the arrest of the plaintiff; on the second exception, that they should be told that there was no evidence to go to them that the defendant maliciously, or without reasonable or probable cause for so doing, caused the writ of *capias ad satisfaciendum* to be marked for £794. 8s. 3d.; and, on the fourth exception, that they should be told that there was no evidence that the writ of *capias ad satisfaciendum* was overmarked at the time of the arrest of the plaintiff. All these exceptions depend on one question, namely, whether the defendant was or was not bound not to proceed on the execution against the defendant for the whole amount of the debt, and without giving to the plaintiff the benefit of the seizure of the goods of the principal debtors, to the extent of the value of the goods? If he was so bound, then, for the reasons already stated, there was no reasonable or probable cause for so proceeding. It was contended that, whether the plaintiff was or was not entitled to that forbearance, there was, nevertheless, probable cause, if the *defendant believed* that such probable cause existed; that is, that if, before the adjudication of the Court of Equity, he believed that he was, in point of law, entitled to issue execution for the entire, he had probable cause for so doing. In the first place, the defendant's Counsel did not require that any question founded on such belief should be left to the jury; the exceptions therefore do not sustain that argument. In the next place, I see no evidence of the existence of any such belief; and, of the contrary, there is very plain evidence in the defendant's letter to the Sheriff, dated the 18th of June, and read in evidence on the part of the defendant, not of course as evidence of any fact stated in it, but as part of the correspondence with the Sub-sheriff of Donegal. It purported to be written on the part of the Banking Company, and to state that the writs of *capias* had been issued by mistake, and

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M. T. 1856. that the Banking Company did not wish the bodies of any of the  
Exchequer. Spencers to be taken, as they were quite aware that they could not  
 SPENCER take them until, by a sale of the goods, they should ascertain that  
 v. there was not enough to pay the debt. This letter was written  
 THOMPSON. after the arrest; whether it was or was not written before the  
 writer knew of the arrest was of course a matter for the con-  
 sideration of the jury. But, independently of this, I should require  
 some very plain authority for holding that if a party, with malice,  
 arrests another for more than is due, with full knowledge of the  
 facts, he must be considered as acting with probable cause, although  
 he acted under a mistaken impression that the law sanctioned what  
 he knew to be injustice. I do not think, as at present advised, that  
 the authorities cited sanction that proposition. At all events, the  
 question, for the reasons I have stated, is not open on these  
 exceptions.

The only difficulty which I have have had in reference to these  
 exceptions arises from this, that, in the charge, the requisition of  
 the plaintiff to the defendant to sell the goods is not stated as one  
 of the elements on which the obligation of the defendant to sell them  
 was founded. If the rule, as laid down by Lord Eldon, in *Wright*  
*v. Simpson* (a), and adopted by the Vice-Chancellor in *Newton v.*  
*Charlton* (b), be right, that element was not necessary. At all events,  
 none of the exceptions is pointed to this matter; and the jury, on  
 the third issue, have found, in effect, that the defendant was called  
 upon to sell the goods before the day on which the plaintiff was  
 arrested.

The fifth exception is a repetition of the objection to the reception  
 of the proceedings in the Court of Chancery in evidence, in the  
 form of a requisition to the Judge to exclude them from the jury,  
 as any evidence showing that credit should have been given, at the  
 time of the arrest, for the value, as afterwards ascertained, of the  
 goods seized under the writs of *fiery facias*. For the reasons already  
 stated for overruling the exception to the admission of that evidence,  
 this exception also ought to be overruled.

There remain to be disposed of the third and the sixth exceptions.  
 The third exception, in effect, insists that the jury ought to be told

(a) 6 Ves. 734.

(b) 2 Drew. 345.

that the right of deduction to which the plaintiff was decreed entitled on account of the seizure of the goods of John and Robert Spencer, and on account of the alleged neglect of the defendant to sell them, was not such a deduction that the omission to make it was evidence of malice in the defendant. The answer to this exception is, that if the defendant's purpose in causing the arrest of the plaintiff was to shelter the property of the principal debtors, by enforcing payment of the entire debt from the plaintiff—the surety—when the amount of the debt, or the value of the goods of the principals might have been recovered under the writs of *fiery facias* under which those goods had been seized, that was such an indirect motive as was evidence of malice. And such, in effect, was the instruction given to the jury. The direct and legitimate purpose of the writ is the recovery of the debt. If that purpose could have been, in the whole or in part, accomplished by the writs of *fiery facias* against the principal debtors, to relinquish these writs and cause the imprisonment of the surety, and to do that with the motive of serving them by injuring him, was plainly evidence for the jury on the question of malice.

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The sixth exception insists that the jury should be told that the letters of Messrs. Colhoun & Knox, subsequent to the arrest, were no evidence of malice in the issuing or executing the writ of *capias ad satisfaciendum*. The answer to this exception is plain:—Messrs. Colhoun & Knox appear to have been acting, during the proceedings in the Court of Chancery, as solicitors for the defendant and for Messrs. Mitchel and Batt, who were his co-plaintiffs in the judgment at law, and his co-defendants in the petition suit in Chancery; and the letters in question were part of a correspondence which took place pending that suit, with a view to the plaintiff's liberation from prison. The result was, his continued detention in gaol, at the suit of the defendant and his co-plaintiffs in the execution. The jury were at liberty to draw their inference, as to motive, *ex antecedentibus et consequentibus*; \* and to form their opinion from the entire conduct of the defendant in reference to the

\* See *Lucas v. Godwin* (3 Bing., N. C., 745; S. C., 4 Scott, 509; *Taylor v. Williams* (2 Barn. & Adol. 857.)

M. T. 1856. imprisonment, both before it took place and while it was continued  
*Eschequer.*  
or prolonged; and part of that conduct was evidenced by the letters,  
SPENCER written by the solicitors acting on behalf of himself and his co-  
v. plaintiffs in the execution under which the arrest was made, on the  
THOMPSON. very subject of the imprisonment.

Many of the arguments urged before us, in reference to the subject of malice, were applicable only to the weight and effect of the evidence, and might have been deserving of much consideration if we were dealing with a motion for a new trial. But we are, upon this record, precluded from considering the weight of the evidence, and have only to determine whether the matters to which these two exceptions are applied were any evidence to go to the jury on the question of malice; and I am very clearly of opinion that they were.

The decision of the Court is, that the exceptions be overruled, and that there be judgment for the plaintiff.

PENNEFATHER and GREENE, BB., concurred. RICHARDS, B.,  
*absente.*

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*Queen's Bench*

BRIDGET HARDIMAN, *Plaintiff*;  
 GEORGE DREVAR FOTTRELL, *Defendant*.

(*Queen's Bench*.)

May 8, 24.

D. LYNCH, on behalf of the defendant, moved that further proceedings in this action be stayed, upon the terms of the defendant herein, in discharge of the bail bond in summons and plaint mentioned, forthwith rendering Patrick Fottrell to the custody of the Marshal of the Four Courts Marshalsea, and of said defendant paying the costs of the plaintiff heretofore incurred in this action, on the grounds that the said defendant was always willing to render the said Patrick Fottrell in discharge of said bail bond, but was never called upon so to do; and also on the grounds that the said bail bond was waived by the said plaintiff, in proceeding upon the appearance and defence filed by the said Patrick Fottrell, and in not having required the said Patrick Fottrell to have entered into bail to the action.

Where a *fiat* had been obtained, and an arrest made thereunder at the suit of the plaintiff, and a bail bond executed, on which bail was never perfected, and the plaintiff in the writ having obtained judgment in the action—*Held*, by obtaining such judgment, the plaintiff did not thereby lose his right to take an assignment of the bail bond, and proceed against the bail.

This was an action on a bail bond given to the Sheriff, on the discharge of one Patrick Fottrell, who had been arrested on a *fiat*. Bail at bar was never perfected, but the action was proceeded with against Patrick Fottrell; and judgment having been recovered therein by the present plaintiff, a writ of *ca. sa.* issued thereon, directed to the Sheriff of the city of Dublin, for the arrest of the said Patrick Fottrell, upon which the Sheriff made a return of *non est inventus*. The plaintiff, failing to realise her demand upon foot of this judgment, against Patrick Fottrell, obtained an assignment of the bail bond, and commenced an action thereon against the present defendant.

*Lynch.*

The plaintiff, having proceeded in the action against Patrick

T. T. 1856. Fottrell, before bail at bar was given, has thereby waived his right to have an assignment of the bail bond, and to take proceedings thereon; it was so decided in *Betts v. Smyth (a)*.  
*Queen's Bench*  
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*Beytagh and Hayes, contra.*

Bail is now bail to the action—bail to the Sheriff is done away with. The old statute of *Hen. 6 (b)* directed that the Sheriff should give security to appear to the action at the day named in the writ; and under the old practice, until an appearance was entered, the plaintiff could not proceed; and if bail at bar were given, and the bail bond assigned, the party should come in promptly to surrender his principal; and if he did not come in time, the bail was fixed with the debt. The plaintiff might formerly waive his right to bail at bar, by proceeding with his action before it was put in; but now, by the provisions of 3 & 4 *Vic.*, c. 105, you may at any time pending the action arrest the defendant, and it is his duty, when required, to put in special bail. By the 25th Rule of January 1854, he had eight days to bring in the body, and, not having done so, the bail are fixed. It is plain, from section 4 of 3 & 4 *Vic.*, c. 105, that the proceedings against the bail were collateral to the action.—[MOORE, J. How do you reconcile this with the concluding part of the 3rd section—does not that assimilate the *fiat* to the arrest under the old practice?]  
 —No; it was the duty of the defendant, or of his bail, to have special bail perfected: *Phillips v. Whitehead (c)*. In *Betts v. Smyth*, it was held that where a *capias* had been sued out, arrest made and bail bond executed, the plaintiff, after taking an assignment of the bail bond, might proceed in the action, without losing his right to sue the bail; and the judgment of Lord Denman in that case fully explains the difference between the old and the new practice on that subject.

*Pallas* replied.

*Curr. ad. vult.*

(a) 2 Q. B. 113.

(b) 23 *Hen. 6*, c. 9.

(c) 1 Chit. R. 270.

LEFROY, C. J.

This is an action on the bail bond assigned by the Sheriff, and the application to the Court is to stay proceedings against the bail, on the condition of their rendering the body of the defendant to the custody of the Marshal. There is no doubt that, since the late Act, in the event of a defendant intending to leave the country, the plaintiff can obtain leave to issue a writ against him, under which he would be entitled to obtain bail from the defendant; but formerly he could enforce bail merely by issuing a bailable process. That had a double object, to compel an appearance, and to obtain security. The Sheriff was to take his body, and then take bail for his appearance; and on his appearance bail at bar was given, which operated as bail to the action. If, before bail at bar was given, the plaintiff took an assignment of the bail bond to the Sheriff, the Court held that the proceeding in the original action was a waiver of the right to proceed on the bail bond; for they should assume that the party had appeared, and therefore the exigency of the writ was complied with; but under the late Act, the process to get bail is a collateral proceeding; it is not a proceeding to enforce an appearance, but it is a proceeding to secure the debt. The plaintiff may have issued his summons and plaint, and during any stage of the action he may issue process to secure the debt, and compel the defendant to give security for it. In *Betts v. Smyth*, the whole matter was decided. Where a party takes this collateral process, the rule that applied formerly no longer applies. Therefore, under the authority of this case, we are of opinion that the plaintiff cannot be restrained from proceeding on the bail bond.

Motion refused, with costs.

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May 24.

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*Queen's Bench*

Jan. 30.

April 23.

MURRAY v. BYRNE and another.\*

A, being confined in the Marshalsea, under a civil-bill decree, at the suit of B, a petition was presented by him for his discharge as an insolvent debtor; and before adjudication on that petition, an order of the Insolvent Court was served on the insolvent, requiring him to file a schedule, which he disobeyed; and an order was then obtained, on application of C, as attorney of B, for his committal for this contempt, and a warrant was thereupon granted by the Insolvent Court; and by virtue of this warrant, A was committed to the Richmond Bridewell, where he remained until discharged by order of this Court, such committal being illegal. In an action for false imprisonment, brought by A against B and C, the above facts were proved; and also a bill of costs by C, charging costs for obtaining this warrant. Evidence was also tendered of conversations between plaintiff and one of the defendants, which took place two months prior to the committal, to show malice.—*Held*, that this evidence was inadmissible.

THIS was an action for an arrest and false imprisonment; to which defendants pleaded, first, a traverse, and secondly, a justification. To the pleas of justification the plaintiff demurred, and the demurrer was allowed (a).

On the trial of the issue raised on the first plea, before the Lord CHIEF JUSTICE, at the Sittings after Hilary Term 1855, the plaintiff gave in evidence a certificate of the committal of the plaintiff to the Marshalsea, on the 31st of May 1852, under a civil-bill decree, for £21, obtained by one of the defendants, J. Thomas Byrne, against the plaintiff; and also a petition by the said J. Thomas Byrne to the Court for the Relief of Insolvent Debtors, for a vesting order in the matter of Thomas Murray (the plaintiff) an insolvent debtor, and filed the 22nd of June 1852, in which defendant J. Rose Byrne was attorney for defendant J. Thomas Byrne; also a vesting order under that petition, and an order directing the plaintiff, within fourteen days, to deliver in his schedule, as directed by the Act of Parliament; also a conditional order, made on the application of J. Rose Byrne, as attorney of J. Thomas Byrne, directing a warrant to issue for the committal of the insolvent to Richmond Bridewell, for not filing his schedule, unless cause shown in two days; and an order, on application of same person, making absolute

*Held also*, that even though the order of the Insolvent Court, directing the committal of the plaintiff, was illegal, yet being an order of a competent jurisdiction, the defendants could not be held responsible for acting under it, in an action of trespass.

(a) 4 Com. Law Rep. 642.

\* FERRIN, J., *absente*.

the conditional order. The plaintiff also gave in evidence a bill of costs, admitted to have been furnished by defendant J. Rose Byrne, for costs incurred by J. Thomas Byrne, in the matter of the insolvency of the plaintiff, relying on certain items therein, being charges in respect of obtaining the conditional and absolute orders for the committal of the plaintiff to the Richmond Bridewell, and for bespeaking and lodging the warrant for that purpose.

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The plaintiff was also examined on his own behalf, and deposed that he was in confinement in the Marshalsea in July 1852, when he was removed to the Richmond Bridewell under the above warrant, in which prison there was no separate place for debtors; and that he remained in confinement in said Bridewell until June 1853, when he was discharged by order of the Court of Queen's Bench.

The plaintiff then, with a view to show the circumstances under which he had been imprisoned in the Richmond Bridewell, and the malice of the defendant, was asked if he had any conversation with the defendants, or either of them, before his first committal to the Marshalsea? and he stated that he had. Plaintiff was then asked what such conversation was? and defendants objected to such conversation being given in evidence; and the learned Judge refused to receive the evidence of such conversation.

And the plaintiff, with a view to show that the defendants were actuated by malice, in procuring plaintiff to be imprisoned in the Richmond Bridewell, tendered evidence to show that the defendants had been animated by malicious motives in plaintiff's first imprisonment: all which evidence the learned Judge refused to receive; whereupon the plaintiff excepted to the rulings of the learned Judge.

The plaintiff then gave in evidence an order of the Court of Queen's Bench, bearing date the 6th of June 1853, for his discharge from confinement in the Richmond Bridewell; and the defendants not having given any evidence, the learned Judge charged the jury, and told them that the defendants did not appear to have done more than to move the Insolvent Court to commit the plaintiff for his contempt, and to have delivered the warrant to the governor of the Richmond Bridewell: and thereupon the Counsel for the



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plaintiff required the learned Judge to say that, such being the facts proved in evidence, the defendants were on the evidence shown to be trespassers, and that the jury should find for the plaintiff: which his Lordship refused to do, and left the whole case to the jury upon the evidence; whereupon the plaintiff again excepted.

*Exham and Ball*, in support of the exceptions.

We contend, in the first place, that under a traverse of the fact of an assault and imprisonment, the defendants were not at liberty to rely upon an invalid order of a Judge of the Insolvent Court, and that every person acting under, and to forward the execution of, such invalid order, is a trespasser; and secondly, if the mere fact of acting under and forwarding the execution of the order for committal of the plaintiff did not of itself render the defendants trespassers, yet if they were actuated by malicious motives in procuring the order, and having it executed, and that their conduct was not a mere *bona fide* application to, and obedience of, the Insolvent Court, they would thereby become trespassers; and that, therefore, the conversations and evidence were admissible, with a view of proving the indirect conduct and motives of the defendants.

The Court may be pressed by the ruling of the Common Pleas, in *Dickson v. Capes* (a), where that Court held that an action of trespass will not lie against a principal or his attorney, who act upon the order of a Court of competent jurisdiction; but that case differs essentially from the present: there the attorney derived no advantage from the proceedings, he merely lodged the warrant of committal with the officer of the Court, and directed him to act on it; but here, the attorney interfered directly, and charged costs for the execution of the warrant, and thus he becomes liable as a trespasser. Besides, in *Dickson v. Capes*, there was no malice proved—no indirect motive to induce the petitioner in the insolvent matter to proceed in the business. But when the attorney is a participator in the arrest, he and the clients are liable.—[LEFROY, C. J. Would the malice of the client affect the attorney, or is malice the test of

(a) 7 Ir. Jur. 165; S. C., 5 Ir. Com. Law Rep. 182.

trespass?—Admittedly not; but the plea here is “not guilty.”—*E. T. 1856.*  
 [MOORE, J. Suppose the act done illegal, the defendant relies on a privilege to justify the act, and you say if malice animated the act, he cannot rest on privilege.]—*Green v. Elgie (a)* was the case on which *Dickson v. Capes* rested; and that decided that an attorney who deliberately directs the execution of a warrant is liable in trespass if it prove bad. If in fact the attorney or client do not proceed *bona fide*, but apply to the Court for some indirect purpose, and deliver the writ to the Sheriff, the moment that indirect purpose is shown, the protection of privilege is withdrawn: *Braham v. Barker (b)*; *Bryant v. Clutton (c)*. In that case, Parke, B., says:—“The act complained of is one which was done “in consequence of the act of the defendant himself. The plaintiff “has been brought into Court in consequence of the act of the “defendant;” and he is called upon to justify that act: *Eggington v. Mayor of Lichfield (d)*.  
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*Sidney and Fitzgibbon, contra.*

*Dickson v. Capes* was decided on a different state of facts, and in fact was an action on the case. Malice cannot be admitted, to make that a trespass which in fact is not trespass at all: *Cooper v. Harding and Smith (e)*. Attorneys are not liable in trespass, if they have taken no steps in the execution of the warrant, except ordering it to be prepared by an agent, who, when it was ready, gave the messenger notice to take it. The evidence rejected here was of a conversation long prior to the imprisonment of the plaintiff; and how could that conversation make the act an imprisonment, which the jury found was not an imprisonment? If a man be not a trespasser by his acts, malice cannot make him one.

*Cur. ad. vult.*

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LEFROY, C. J.

This case comes before the Court on a bill of exceptions taken April 23.

(a) 5 Q. B. 99.

(b) 3 Wils. 368.

(c) 1 M. & W. 408.

(d) 5 E. & B. 100.

(e) 7 Q. B. 928.

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by the plaintiff at the trial. The action was for assault and false imprisonment; the imprisonment being by a committal by the Insolvent Court to the Richmond Bridewell, the plaintiff being therefrom discharged on *habeas corpus* granted by this Court. The action was brought against the attorney, and his client who was the actor in the proceedings, and under whose direction the plaintiff was imprisoned. The defence denied the assault and imprisonment, and also justified. A demurrer was put in to this justification, and this Court allowed the demurrer, thereby holding that the justification was not established; that therefore is out of the case.

There remained, however, a denial of the taking and imprisonment; and that came to be tried on the issue, whether the defendant did take and imprison the plaintiff? The plaintiff, in order to make out his case, proved that he had been confined in the Marshalsea, under an execution under a civil-bill decree, and, being so confined, a warrant was lodged with the governor of the Richmond Bridewell, under which he was removed from the Marshalsea to the Richmond Bridewell, where, he alleges, he was unlawfully imprisoned. He proved his removal from the Marshalsea on the 23rd of July 1852, he having been confined there from the previous month of May; and he produced the warrant that had been lodged by one of the defendants (the attorney) with the keeper of the Richmond Bridewell. The defendants state, as their defence for that proceeding, these facts:— That the plaintiff being in the Marshalsea, a petition was presented by him to the Insolvent Court, for relief under the Insolvent Statutes, where the regular proceedings were taken for that purpose. Before an adjudication on that petition was made, certain interrogatories were administered to the plaintiff, one of which was to compel him to return a proper schedule. An order was served on the insolvent for that purpose, and he disobeyed that order; and the Insolvent Court thereupon made a conditional order that he should be committed for a contempt of Court; and no cause being shown against that order, same was made absolute, and thereupon the plaintiff was committed, for the contempt, to the

Richmond Bridewell. All these proceedings were perfectly regular; the order made was for contempt, by a Court of Record, of competent and exclusive jurisdiction.

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The plaintiff, however, insists that the warrant was illegal, because the order, and the warrant founded on it, directed an imprisonment in the Richmond Bridewell; and, in order to make the attorney liable for that alleged illegal imprisonment, he produced a bill of costs, to show that the attorney was the active party up to the last moment in the matter. He also gave in evidence a conversation, which he swore took place between himself and one of the defendants, two months prior to the committal, in order to show malice. The learned Judge rejected that evidence on the ground of irrelevancy; and that was the basis of the first exception. The relevancy of the evidence was not apparent, though it might be evidence in an action for maliciously, and without probable cause, instituting those proceedings; but if the proceedings here instituted were legal, that evidence could not make them illegal. We therefore all concur in opinion that this evidence was properly rejected.

But further, the plaintiff required a direction that the defendants were trespassers by these proceedings; for he insisted that the warrant was illegal, and required the Judge so to direct the jury. He contended that that was an invalid order, and the defendant could not rely on it; and therefore that no protection was afforded by it, and that the parties acting under it were trespassers.

No doubt, if the Court was a Court of competent jurisdiction, and the order made that of a Court having full jurisdiction over the subject-matter, that order, even though erroneous, will protect the party acting under it. That was in fact the second resolution in the *Marshalsea case* (a), and that the Judge was called on virtually to overrule. Therefore, whether the order of the Insolvent Court was valid or invalid, it was the order of a Court of competent jurisdiction, and we are not called on to say whether it was an erroneous order or not; it was one perfectly within the limits of the Court. We have no doubt upon the questions raised, and the exceptions must be overruled.

(a) 10 Rep. 68 b.

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CRAMPTON, J.

I concur with my LORD CHIEF JUSTICE. This was a right verdict, and the exceptions are not sustainable.

The action was one of trespass *vi et armis*, and the only plea on the record, on which the issue could go to the jury, was, "not guilty." The plaintiff, as part of his evidence, produced the order of the Insolvent Court, and the warrant founded thereon, and, under the general issue, he said he was entitled to a verdict, this order being illegal and invalid, and that every person acting under it was a trespasser. But it is settled by authority, that wherever a Court, having general jurisdiction over the subject-matter, makes an erroneous order, and issues an invalid warrant founded on that order, neither the party obtaining the warrant founded thereon, or his attorney, is liable in an action of trespass for putting the Court into activity. The Court may be answerable for its order in some shape or other; but if the party do nothing more than put the Court in motion, he is protected; if, however, a party go beyond that, and take an active part in the arrest, it will make that person a trespasser. The Court of Common Pleas in this country have pronounced an unanimous judgment on this subject, resting on the authority of *Cooper v. Harding and Smith* (a); and there the Court held that attorneys were not liable in trespass, they having obtained a warrant of a Commissioner of Bankruptcy, under which the party was arrested, but which proved invalid, because they had taken no steps in the execution of the warrant. *Green v. Elgie* is a most unsatisfactory case, as reported; but, at all events, it does not touch the present case. In *Carratt v. Morley* (b), it was expressly laid down that the party merely putting the Court in motion, if he have nothing more to do in the matter, is not liable in trespass; he but originates the proceedings, and directs the procurement of what causes the trespass; here no more was done than lodging the warrant of committal.

MOORE, J.

It appears to me that, in an action like the present, the facts

(a) 7 Q. B. 928.

(b) 1 Q. B. 18.

proved did not sustain the case. The plaintiff, becoming embarrassed in his circumstances, applied to the Insolvent Court for relief. The Insolvent Court had clear jurisdiction in the matter. One of the defendants was a creditor of the plaintiff, and the other defendant was his attorney, and he had a right to act in that Court on behalf of his client. The Court was one of competent jurisdiction, and pronounced an order, which I will assume was an erroneous order, for the purpose of the argument; but it would be going a great length to say that the party would be responsible for that order, so made by a Court of competent jurisdiction. But then it is said the defendants went further, and that the attorney took out the order; that it was the duty of the attorney and the right of the client to take out the order and deliver it; if so, these facts do not constitute either party a trespasser. The other exception, grounded on the rejection of evidence of malice, seems quite untenable. It appears to me that if it be once established that what has been done was done in the exercise of a legal right, that evidence of that sort cannot be received, because of its immateriality—that what was passing in the mind of the party is in fact quite unimportant.

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LEFROY, C. J.

I do not hold that there is any distinction to be taken between what the attorney does by his own hand and what he calls on another to execute. If the attorney be liable at all, he is liable as much for delivering a warrant to the officer to execute, as if done by himself; and, if protected, he is equally protected, if he act *per se*, or through the officer. He in fact who authorises a trespass is a trespasser.

Exceptions overruled.

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H. T. 1857.

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## BANKS v. CONEYS.

*(Common Pleas.)*

Jan. 21, 31.

In an action for penalties, brought under the 1 & 2 Vic., c. 56, s. 93 (Irish Poor-law Act), against a guardian of the Clifden union, for supplying certain provisions to that union, the venue was laid in the county of the city of Dublin. The defendant pleaded that in such actions the venue was local, under the 2nd section of the 10 & 11 Car. 1, c. 11, and that the plaintiff had not made an affidavit that the offences were committed in the county where the venue was laid, as required by the 3rd section of that statute.—

*Held*, on demurrer, that the 1st, 2nd and 3rd sections of the 10 and 11 Car. 1, c. 11, apply only to cases where the

party has an option of suing in an Inferior or in a Superior Court, and do not apply to cases where the action is required to be brought in a Superior Court, as is the case in actions for penalties under the 1 & 2 Vic., c. 56, s. 93.

THIS was an action brought under the 93rd section of the 1 & 2 Vic., c. 56, by the Poor-law Commissioners, in the name of their chief clerk, against one of the guardians of the Clifden union, in the county of Galway, to recover three separate penalties of £100, for supplying, while he was such guardian, or for being concerned directly or indirectly in a contract, for his own profit, for certain goods and provisions for the use of that union. The venue was laid in the county of the city of Dublin. The defendant traversed each of the three paragraphs in the summons and plaint, and then pleaded, fourthly, "That the alleged offences complained of in each of the causes of action in said plaint mentioned were not, nor was any of them, committed in the county of the city of Dublin;" and defendant pleaded, fifthly, that plaintiff had not, according to the provisions of the statute in that case made and provided, taken an oath before some of the Judges of her Majesty's Court of Common Pleas (that being the Court in which the action was brought), that the offences laid in the plaint were not, nor was any of them, committed in any other county than in the county of the city of Dublin, nor that he the plaintiff believed the said offences, or any of them, were or was committed a year before the commencement of the action.

The plaintiff demurred to the fourth plea, on the ground that the venue in the action was not local; and to the fifth defence, on the ground that the oath therein mentioned is not necessary when the action is brought under the 1 & 2 Vic., c. 56, s. 93.

*E. Pennefather* and *D. Lynch*, in support of the demurrer.

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The 93rd section of the 1 & 2 *Vic.*, c. 56, enacts that no guardian shall supply, for his own profit, any goods or provisions for the use of any union of which he is a guardian, nor be concerned directly or indirectly in supplying the same, "under the pain of forfeiting the sum of £100, with full costs of suit, to any person who shall sue for the same by action of debt, or on the case, in any of her Majesty's Courts of Record at Dublin." It is maintained for the defence that, under the provisions of the 10 & 11 *Car.* 1, c. 11, the venue in penal actions is local. That statute corresponds to the 21 *Jac.* 1, c. 4 (*Eng.*). There is also an English Act of the 31 *Eliz.*, c. 5, but it does not apply to Ireland. The provisions of the 21 *Jac.* 1, c. 4, do not apply to offences created by subsequent statutes: *Hicks' case* (a); *Rex v. Gaul* (b); *French v. Coxon* (c). In 1 *Wms. Saund. Rep.*, p. 312 b, it is said:—"With respect to actions upon penal statutes, it may be observed, first, that the statute of 21 *Jac.* 1, c. 4, s. 1, is held to be confined to such statutes only as were in being at the time of making it. Secondly; it does not give any new jurisdiction to the Inferior Courts, where they had none before. This last may be said to be a fundamental rule in the construction of the 21 *Jac.* 1; and therefore, where the penalty is to be recovered by action, information, &c., either in the Courts of Record at Westminster, or in the Courts of Record only, where no essoin, protection, or wager of law shall be allowed, which words are held to mean the Courts at Westminster, the statute of 21 *Jac.* 1 does not apply. Thirdly; where the informer has an election to proceed either by action, &c., in the Superior Courts to sue for the penalty, or by indictment at the Assizes or Sessions, he may still sue for the penalty in the Superior Court. Fourthly; but where the penalty may be sued for by action, information, &c., either in the Courts at Westminster, or at the Assizes or Sessions of the Peace, the 21 *Jac.* 1 prohibits any suit in the Superior Courts." *Buller's N. P.*, p. 195 b. Neither do they apply to penal actions which *must* be brought in the Superior

(a) 1 Salk. 373.

(b) 1 Salk. 372.

(c) 2 Str. 1081.



H. T. 1857. Courts. In *Barber v. Tilson* (a), Lord Ellenborough (p. 437) reviewed the statute of 21 Jac. 1, and said, "The preamble goes on to recite 'that the poor commons of the realm are grievously vexed by being prosecuted and forced to appear in the Courts at Westminster;' therefore the grievance aimed at was the drawing them up from their homes to the Courts at Westminster. For remedy of this grievance, the statute enacts that all offences against any penal statute shall be commenced, sued, prosecuted, tried, recovered and determined by action, &c., before the Justices of Assize, of Nisi Prius, of Oyer and Terminer and Justices of Gaol Delivery, or before the Justices of Peace of every county, &c., wherein such offences shall be committed, in the Courts, places of judicature or liberties respectively, and not elsewhere." In *Leigh v. Kent* (b), the Court refused to stay proceedings in debt on a penal statute, after verdict, though no affidavit had been filed that the offence was committed in the county where the action was brought, and within a year before the bringing of it; and it was held that the 21 Jac. 1, c. 4, only applied to those penal statutes on which proceedings may be had before the Justices of Assize, Justices of the Peace, &c. Lord Kenyon, in his judgment, said, "I have looked into the old cases on this subject; and the result of my researches is, that the statute of 21 Jac. does not control any of those statutes on which penal actions are to be brought in the Superior Courts." In *Stratton v. Molony* (c), which was tried in the Sittings after Hilary Term 1843, an action for a penalty was brought under the Poor-law Act, the venue being laid in Dublin. After trial had and judgment obtained, an application to change the venue to Louth, where the offence had been committed, was refused by the Court. The 3rd section of the 10 & 11 Car. 1 (as to the affidavit) is merely directory. By the 62nd section of the Common Law Procedure Act, the venue in any personal action may be laid in any county that the plaintiff may think proper. A personal action includes the right to recover a debt; and a penalty is a debt: *Shinler v. Roberts* (d). The Common Law Procedure Act is conversant with penal actions, and double pleadings have

(a) 3 M. &amp; S. 429.

(b) 3 T. R. 362.

(c) Not reported.

(d) Bull. N. P. 197.

been allowed in such actions, though the 4 *Anne*, c. 16, which allowed double pleadings, did not extend to penal actions: *Heyrick v. Foster* (a); *Pounds v. Carr* (b). He also cited *Shipman v. Henbest* (c); *Balls v. Atwood* (d).

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*Blake* and *M. Morris*, in support of the plea.

Those cases, which decide that the statute of 21 *Jac.* 1 do not apply to actions under subsequent penal statutes, were all decided upon the 1st section; but the 4th section of the 21 *Jac.* 1, which allows a plea of the general issue in penal actions, has been held, in *Earl Spencer v. Swannell* (e), to be general, and to apply to subsequent statutes. The 2nd section of the statute of *Charles* is as general in its language as the 4th section of the statute of *James*, and should be held to be general, and not limited like the 1st section. The words of the 2nd section, "Any offence committed, or to be committed against any penal statute," show that it was meant to apply to subsequent acts. In the schedule to the Common Law Procedure Act, the 10 *Car.* 1 is not among the statutes thereby repealed.

MONAHAN, C. J.

This was an action brought to recover penalties, under the 93rd section of the Poor-law Act (1 & 2 *Vic.*, c. 56). That section enacts that no guardian shall supply, for his own profit, any goods or provisions for the use of any union of which he is guardian, nor shall he be concerned directly or indirectly in any contract relating thereto, "under pain of forfeiting the sum of one hundred pounds, with full costs of suit, to any person who shall sue for the same by action of debt, or on the case, in any of her Majesty's Courts of Record at Dublin." It is evident therefore that such an action must be brought in a Superior Court. In the present action, the venue was laid in the county of the city of Dublin. The defendant pleaded five defences; three were on the merits; the fourth plea

*Jac.* 31.

(a) 4 T. R. 701.

(b) 3 Ir. Jur. 388.

(c) 4 T. R. 409.

(d) 1 H. Bl. 347.

(e) 3 M. & W. 154.

H. T. 1857. states that the alleged offences were not, nor was any one, committed in the county of the city of Dublin.

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The fifth defence is that the plaintiff had not, according to the statute in that case made and provided, taken an oath before some of the Judges of her Majesty's Court of Common Pleas, that the offences laid in the plaint were not, or that any of them was not, committed in any other county than in the county of the city of Dublin, nor that he, the plaintiff, believed the said offences were committed a year before the commencement of the suit. To the fourth and fifth pleas the plaintiff has demurred. The question in this case turns upon the construction of the 1st, 2nd and 3rd sections of the 10 & 11 *Car.* 1, c. 11; the defendant contending that, under the 2nd section of that Act, the venue in the present case should be laid in the county where the offence was committed, and that, under the 3rd section, there ought to be the verifying affidavit required by that section.

The 21 *Jac.* 1, c. 4, is the corresponding English Act. Its 3rd section is the same as the 3rd section of the statute of *Charles*; and it has been decided in several cases that the 1st section of the 21 *Jac.* applies only to actions which the party had a right to commence in an Inferior Court, and that it also applies only to actions brought to recover penalties incurred prior to the 21 *Jac.* 1, and, in Ireland, of course, prior to the 10 & 11 *Car.* 1. On the other hand, it has been decided, in *Earl Spencer v. Swannell* (a), that the 4th section of the 21 *Jac.* 1 applies to actions in Superior Courts; and the Court intimated a strong opinion that that section applies also to actions for penalties, brought under statutes passed subsequently to the statute of *James*. Now, the question that has been argued before us is this:—are the 2nd and 3rd sections limited to the same cases as the 1st section, or is the 2nd section general in its operation, like the 4th section? In *Earl Spencer v. Swannell*, Baron Parke held that the 2nd section was so limited; but it is said that in that case it was unnecessary to decide the point, inasmuch as there is another English statute making the venue in such cases

(a) 3 M. & W. 154.

local. We have considered this case independently of that decision, and we are of opinion that, on the face of the Act itself, it is plain that these three sections apply only to one class of cases, those cases, namely, which, by the 1st section, the party may commence in an Inferior Court, and therefore do not apply to cases where the party must commence his action in a Superior Court; and, by the 93rd section of the Irish Poor-law Act (1 & 2 Vic., c. 56), it was imperative to commence the present action in a Superior Court at Dublin.

The 1st section of the 10 & 11 Car. 2, c. 11, enacts.—[Here his Lordship read the section.]—Now it is plain, upon reading that section, that whether or not it applies to actions for penalties incurred under subsequent statutes, it, at all events, applies only to cases where, by the law as it stood at the time of the passing of the Act, or by subsequent statutes, the party has an option of suing either in an Inferior Court or in a Superior Court at Dublin. That section merely describes the Court where the party may sue. Then the 2nd section enacts, that in all informations and in all declarations in any action under a penal statute, the offence shall be laid and alleged to have been committed in the said county where such offence was in truth committed; and that if the defendant shall plead “not guilty,” and the plaintiff shall not prove the offence, and that it was committed in that county, then the defendant shall be found not guilty. Now that is general; and, were it not for the 3rd section, there might be a doubt of its true construction. But the 3rd section enacts, “That no officer or minister in any Court of Record shall receive, file or enter of record, any information, bill or plaint, count or declaration, grounded upon the said penal statutes, or any of them, which, before this Act, were appointed to be heard and determined in their proper counties, until the informer or relator hath first taken a corporal oath before some of the Judges of that Court, that the offence or offences laid in such information, action, suit or plaint, was or were not committed in any other county than where, by the said information, bill, plaint, count or declaration, the same is or are supposed to have been committed; and that he believeth, in his conscience, the offence was

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H. T. 1857. "committed within a year before the information or suit, within  
*Common Pleas.* "the same county where the said information or suit commenced;  
 BANKS "the same oath to be there entered of record." It is quite  
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 applies to the cases provided for by these cases, namely, where  
 actions for penalties are to be brought in local jurisdictions.  
 Therefore we think that these three sections apply to the same  
 subject-matter, that is to say, to actions for penalties, which the  
 party had an option of bringing either in the Inferior Court or  
 in the Superior Court at Dublin. The 4th section is in the fol-  
 lowing words:—"And be it also enacted," &c.—[His Lordship  
 read the section.]—The word "also," which does not occur in  
 the other sections, appears to intimate that now the Legislature  
 are entering upon a new subject; and the Court of Exchequer  
 has held that it is general, and applies to actions which may  
 be brought in a Superior Court; but the other question was  
 not raised in the case before them, viz., whether that section  
 applies to actions for penalties under statutes subsequently passed?  
 The Court of Exchequer only decided that the 4th section does  
 apply to actions in the Superior Courts, to recover penalties  
 incurred under statutes antecedently passed.

Upon the whole, we are of opinion, and we form that opinion  
 quite independently of the masterly exposition of the law, given  
 by Baron Parke, in *Earl Spencer v. Swannell*, that the 1st, 2nd  
 and 3rd sections of the 10 & 11 Car. 1 apply only to cases where  
 the plaintiff or party suing has the option of suing in an Inferior or  
 in a Superior Court; and therefore there is no section of the 10 & 11  
 Car. 1, c. 11, requiring the venue in the present case to be local,  
 or requiring the affidavit referred to in the 3rd section. It is to be  
 observed that, whatever mischief might have formerly ensued from  
 not requiring the venue to be local, that mischief can no longer  
 exist, as, by the Common Law Proceedure Act (16 & 17 Vic.,  
 c. 113), the Court has full power to make the venue local, if it  
 thinks fit.

BALL, J., JACKSON, J., and KEOGH, J., concurred.

Demurrer allowed.

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## KEEFFE v. KIRBY and Wife.

Jan. 19.

THIS was an action of ejectment on the title, tried before Greene, B., at the Cork Summer Assises 1856, brought to recover possession of part of the lands of Killiteragh, in the county of Cork. The plaint and defence were in the usual form. The evidence, as it appeared at the trial, was as follows:—

By lease of the 30th of August 1800, Thomas Wallis demised to Michael Keffe and Cornelius Keffe, their heirs and assigns, the lands of Killiteragh, containing about 110 acres, for three lives, at a yearly rent of £100. On the 14th of March 1809, a memorandum was indorsed on the lease, to the effect that the lessees covenanted and agreed with each other, and for their and each of their respective heirs and assigns, to hold the demised premises as tenants in common, and not as joint tenants. It appeared that, in pursuance of this agreement, the lessees and their children held the lands in severalty. Michael Keffe, one of the lessees, died in 1814, leaving several sons, and leaving his co-lessee, Cornelius Keffe, him surviving. Michael Keffe, by his will, devised a portion of the lands to one of his sons named Cornelius. That Cornelius died in 1849, intestate, and leaving the plaintiff his eldest son and heir-at-law. Plaintiff's mother had married Kirby, the defendant. It was proved at the trial that one of the lives named in the original lease of 1800 was still in being; that the rent reserved by that lease had been paid by the lessee separately, and that separate receipts had been given; that Cornelius, plaintiff's father, had been in possession

A testator by his will appoints executors, and empowers them "to act as such, and that they will dispose and manage the effects in manner and form following:—First, I recommend my lawful debts to be paid, as my lawful debts to be recovered." He then devised his real estate among his sons in certain portions, each son to become entitled to possession upon his marriage, subject to a proportionate share of the debts and charges affecting the real estate.—*Held*, that the executors took the legal estate only during the interval between the death of the testator and the happening of the event upon which

each son was to become entitled to possession; and that the words of the will did not give the executors a power to sell the lands for the payment of the testator's debts.

*Held also*, that the heir-at-law of one of the devisees, who had died intestate, had a sufficient legal estate to maintain an action of ejectment on the title, although there had been no re-conveyance by the executors.

*Held also*, that continuous possession for twenty years, by a trespasser and those deriving under him, bars the right of the true owner.

H. T. 1857. of the part of the lands devised to him for sixteen or eighteen years,  
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 or six years after his death.

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The plaintiff read the original lease of 1800, and also, subject to defendant's objection, the will of Michael. At the close of the plaintiff's case, Counsel for the defendant submitted that the Judge ought to direct a verdict for the defendant, on the ground that, upon the death of one of the lessees, the entire estate vested in the survivor; and also upon the ground that, supposing the will to be admissible in evidence, still no legal estate passed under it so as to entitle the plaintiff to recover, and that a question as to the surrender of the lease of 1800 should have been left to the jury. His Lordship refused so to direct the jury, but directed a verdict for the plaintiff, subject to be turned into a nonsuit, or verdict for the defendant, if the Court should so think fit.

The following are the words of the will upon which the question arose:—

"In the name of God, amen.—I, Michael Keffe, of &c., I appoint  
 "Thomas Wallis, of the city of Waterford, my beloved wife, until  
 "she does marry or follow any unlawful steps, Cornelius Keffe, of  
 "Killiteragh, and John Connors, of Cunas, to be my executors; and  
 "empower them to act as such, and that they will dispose and  
 "manage the effects in manner and form following:—First, I re-  
 "commend my lawful debts to be paid, as my lawful debts to be  
 "recovered. Secondly, I will, and it is my will, that my son John  
 "Keffe is to have one-third part of the lands I now occupy, paying  
 "for said ground the present rent of said premises, to be given to  
 "him when he, the aforesaid John Keffe, does marry, as also John  
 "Keffe paying the one-third of the debts and charges attending the  
 "same, as also paying Daniel Shehan, as marriage portion with  
 "his sister Catherine Keffe, the one-third of £80 sterling, promised  
 "to him. I will, and it is my will, that my son Thomas Keffe is to  
 "have the other one-third of the aforesaid ground, when he does  
 "marry, under the same clauses as given to aforesaid John Keffe,  
 "to be held by him until the leases are expired on the eastern part  
 "of Killiteragh, and no longer. I will, and it is my will, that Mary,

“my beloved wife, and my sons Cornelius and Michael Keeffe, are  
 “to have the other one-third of said ground, together with the house  
 “I now dwell in, under the same clauses as given to the aforesaid  
 “John Keeffe; and in case that any or either of my said sons  
 “Cornelius or Michael should die, their aforesaid one-third to be  
 “left to him that would survive Cornelius or Michael, until the  
 “commencement of the Eastern Quarter of aforesaid Killiteragh.  
 “I will, and it is my will, that my son Thomas Keeffe is to have  
 “the one-half of the Eastern Farm, as heretofore mentioned; as also  
 “it is my will, that the other half is to be given to my son Cornelius  
 “Keeffe when the aforesaid ground is out of term, paying for the  
 “same the original rent as paid by Thomas Wallis, Esq.; the  
 “aforesaid Thomas Keeffe and Cornelius Keeffe obliging themselves  
 “to pay over unto their sister Anne Keeffe the sum of £80 sterling,  
 “as marriage portion, more or less, according as my executors will  
 “think proper.” The testator then provided for certain other pay-  
 “ments, and in a subsequent part of the will declared, “I will, and it is  
 “my will, that the profit rent arising after the Eastern Quarter of  
 “Killiteragh may and shall be converted to pay Thomas Wallis,  
 “Esq.; and also if in case that the aforesaid Thomas Keeffe and  
 “Cornelius Keeffe, who appointed to Eastern Quarter Farm (a),  
 “and if it should happen that times may get a fall and could not  
 “pay rent for same, that then the aforesaid John Keeffe and Michael  
 “Keeffe on the Western Farm help them, and that it is to be divided  
 “as my executors may deem it proper” (b).

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A conditional order, in pursuance of the leave reserved, having been obtained—

*Jellett and Deasy* showed cause.

If a trespasser and others under him continue in possession for twenty years, the right of the true owner is barred. By the 2nd section of the Statute of Limitations, “No person can make entry or  
 “distress, or bring any action to recover any land or rent, except  
 “within twenty years next after the time at which the right shall  
 “have first accrued to some person through whom he claims, or whose



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"estate he claims;" and by the 3rd section, the right, in the case of an estate in possession, shall be deemed to have accrued at the time of dispossession. *The Incorporated Society v. Richards* (a) decides this point.—[MONAHAN, C. J. Your argument is, that although Cornelius was in possession for less than twenty years, yet as the plaintiff, deriving under his father, was in possession for a period which, together with the time during which the father was in possession, made up more than twenty years, the right of the true owner is barred. There can be little doubt that that is correct.]—It has been so decided, by Patteson, J., in *Doe d. Carter v. Barnard* (b). *Dixon v. Gayfers* (c). There was no evidence of surrender by operation of law: *Doe d. Hull v. Wood* (d).

As to the legal operation of the will. The legal estate vested in the trustees only as long as was necessary for the execution of the trusts; and after the trusts were satisfied, the legal estate vested in the persons beneficially entitled. The trustees took an estate, if any, determinable at the period when the sons' estates came into possession. The word "effects" does not include real estate, even though followed by the words "of what nature and kind soever:" *Campfield v. Gilbert* (e); *Doe d. Chilcott v. White* (f). The legal estate passed not to the executors, but to the devisees, for they were the persons liable for the payment of the testator's debts: *Kendrick v. Lord Beauclerk* (g); *Doe d. Jones v. Harrison* (h). The charge to pay the testator's debts was a charge which could only be enforced in Equity, and did not give the executors a power to sell: *Doe d. Jones v. Hughes* (i).

*Saunders on Uses*, p. 254, *Player v. Nicholls* (k), *Bradshaw v. Bradshaw* (l), and *Utterton v. Robins* (m), were also cited.

(a) 4 Ir. Eq. Rep. 177.

(c) 17 Beav. 421.

(e) 3 East, 516.

(g) 3 B. & P. 175.

(i) 6 Exch. 223.

(l) 5 Ir. Eq. Rep. 310.

(b) 13 Q. B. 945.

(d) 14 M. & W. 692.

(f) 1 East, 33.

(h) 13 Law Jour., N. S., Q. B., 97.

(k) 1 B. & C. 336.

(m) 1 A. & E. 423.

*Sullivan*, in support of the order.

The lands vested in the trustees so as to give them a power to sell. The cases on this point are collected in the 45th chapter of 1 *Jarman on Wills*, p. 495 (ed. of 1856). It is not necessary that there should be a direct devise to the trustees: *Doe d. Gratex and Hoffman v. Homfray (a)*. The sons would not take the legal estate on marriage, without a conveyance from the trustees. If the trustees refused to convey, the sons should file a bill. If the legal estate was ever in the trustees, it was in them still: *Doe d. Davis v. Davis (b)*.—[MONAHAN, C. J. In that case there was an express devise, sufficient to carry the fee.]—Suppose, in the present case, that, on the son's marriage, the debts of the testator were still unpaid.—[MONAHAN, C. J. Then the son would take the estate, subject to the trust to pay the debts.]—Where trustees are directed to pay debts, they must have a power to sell, and if so, the legal estate is in them.

*Deasy.*

*Doe d. Jones v. Hughes (c)* shows that a direction to pay debts does not necessarily give a power to sell. He also cited *Doe d. Jones v. Harrison (d)*.

MONAHAN, C. J.

In this case a question arose upon the Statute of Limitations, but we disposed of it during the argument before us. We decided that point in favour of the plaintiff, and need not advert to it further. The only remaining question in the case is, whether, upon the construction of the will of Michael Kefffe, the legal estate in the portion of the lands for which the ejectment has been brought is now vested in the trustees of the will, or in the plaintiff?

It is quite evident that the will was prepared by some person not acquainted with legal technicalities; and the difficulty in the case arises not from any doubt as to what the law is, but from a doubt as to its application. It is well established law that if, upon the true

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(a) 6 A. & E. 206.

(b) 1 Q. B. 430.

(c) 6 Exch. 223.

(d) 13 Law Jour., N. S., Q. B., 97.

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construction of a will, it appears that such trusts are imposed upon trustees as require that a legal estate should be vested in the trustees, to enable them to carry out such trusts, then such trustees will be held to take the legal estate for that purpose. It is said that in the present case a trust of this nature was imposed upon the executors. The words of the will are these:—"I appoint Thomas Wallis, of the city of Waterford, my beloved wife, "until she does marry or follow any unlawful steps, Cornelias "Keeffe, of Killiteragh, and John Cummins, of Cunas, to be my "executors, and empower them to act as such; and that they will "dispose and manage the effects in manner and form following;" and it has been argued that as these parties were appointed executors, and given power to manage the property, it must be inferred that they took an absolute estate for that purpose. The following words occur in a subsequent part of the will:—"I recommend my lawful debts to be paid, as my lawful debts to be recovered." And it is argued that as the executors were given power to recover the testator's debts, they should also be liable to pay his debts; and that as the words of the will are sufficient to charge the testator's debts upon his real estate, under the word "effects," that the executor should therefore take such an estate as they could sell for the payment of the debts. No doubt, if we could collect from the whole will that the testator meant that the executors should have a power to sell, then they would of course take an estate in fee-simple, or at least some legal estate in *quasi* fee. But the next clause in the will is this:—"I will that my son John Keeffe is "to have one-third part of the lands I now occupy, paying for said "ground the present rent, and said ground to be given to him when "he, the said John Keeffe, does marry, as also John Keeffe paying "the one-third of the debts and charges attending the same, as "also paying Daniel Sheehan, as marriage portion with his sister "Catherine Keeffe, the one-third of £80 sterling promised to him." From that clause it is perfectly plain that the testator directed that when the event arose upon the happening of which this son John was to get the lands, then he, John, and not the executors, was to be liable to pay the debts relating to those lands. It is not upon

this particular devise to John that the question before us is raised, but upon a devise to another son, named Cornelius. However that devise is similar to the devise to John. Therefore it appears to us that, upon the whole will, it is plain that the testator did not contemplate that the executors were to sell in the interval between his death and the time when these sons should enter into possession, and that interval was the only period of time during which the executors could have an estate in the lands; for it is plain that the interest and possession was to vest in each son on the happening of the event mentioned in the will. We think, therefore, that whatever estate vested in the trustees, such estate was only to remain in them until the time when the testator's son should become entitled to enter into possession. Accordingly, we are of opinion that the ruling of the Judge at the trial was right, and the cause shown must be allowed.

H. T. 1857.  
*Common Pleas.*  
KEEFE  
v.  
KIRBY.

BALL, J., JACKSON, J., and KEOGH, J., concurred.

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H. T. 1857.

Crim. Appeal.

## Court of Criminal Appeal.\*

## THE QUEEN v. BOYLE and others.

Jan. 24.

In a warrant authorising a poor-rate collector to levy rates, the occupiers were described as "tenants of commons."—*Held*, that this was an insufficient description of the occupiers, and did not authorise a distress of cattle grazing on the common.

THIS was an indictment for a rescue, tried before the Assistant Barrister for the county of Louth, at the October Quarter Sessions; who reserved the following case for the opinion of the Court.

The traversers were indicted for rescuing forcibly from the custody of John Farley, a poor-rate collector, six cows which he had distrained on the commons of Carlingford, on the 24th of May 1856, for the sum of 17s. poor-rate, and 21s. arrear of poor-rate. At the trial, James Murphy, clerk of the union, proved that, on the 14th of February 1856, a rate was made by the guardians of the union, and produced the rate-book and proved the signature of the chairman, and two of the guardians of the union, and his own signature, as clerk of the union, to the rate so made. He also proved a warrant of same date, signed by the same parties, directed to John Farley, collector of the poor-rates for Carlingford division of said union. The warrant was in these words:—"You are hereby authorised and directed to levy the several poor-rates in the annexed book set forth, from the several persons therein rated, or other persons liable to pay the said rates or arrears of rates." An entry in the rate-book was then read, in which the occupiers were described merely as tenants "of commons." John Farley, the poor-rate collector, proved that he received the warrant, and that on the 24th of May 1856 he proceeded, with two assistants, to the commons of Carlingford to levy the rates; that he seized the cows, which were forcibly taken from him by the traversers, Boyle claiming the cattle as his property. The place on which the distress was made was the open ground or commons of Carlingford, mentioned in

\* *Coram* MONAHAN, C. J., PERRIN and JACKSON, JJ., RICHARDS and GREENE, BB.

the warrant. Witness further stated, that there were 270 house-keepers mentioned in the warrant, who claimed a right of commonage on the land; and that there were 218 persons living on the commons, who had cottages or gardens on the commons, fenced and inclosed from the remainder of the common, for which holdings they were separately rated; that the traverser Boyle was one of those 218 persons, and lived on the commons in a separate holding, for which he was rated separately; and he also claimed a right of commonage in the land or open ground on which the distress was made.

H. T. 1857.  
Crim. Appeal.  
THE QUEEN  
v.  
BOYLE.

On the close of the case, on the part of the traversers, the Court were called on to direct an acquittal, on the ground that there was no valid rate struck, inasmuch as there was no person named therein as immediate lessor, nor as occupier, and inasmuch as under the column "occupier," the entry in the rate-book was an insufficient description. The Court refused to direct an acquittal, and directed the jury to assume that the warrant was sufficient, that the rate was legal, and that therefore the cattle were in legal custody. The jury found the traversers guilty, and sentence was deferred until the decision of this Court should be ascertained, as to the validity of the rating.

*Hamill*, for the prisoner, relied on the insufficiency of the warrant, in not specifying the party liable to the rate.

*Corballis*, contra, relied on *Regina v. Westropp* (a). In that case the occupier was described by the initial letter of his Christian-name, and that was held a sufficient description; and in *Regina v. Higgins* (b), the occupiers were described as the representatives of T. K., and that was held sufficient: *The Queen v. The Inhabitants of Fordham* (c).

GREENE, B.

If no person be assessed, then there is no rate.

(a) 2 Ir. Com. Law Rep. 219.

(b) 2 Ir. Com. Law Rep. 213.

(c) 11 A. & E. 73.

H. T. 1857.

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PERRIN, J.

The rate is imposed on the person in respect of the property rated. In the cases of *The Queen v. Westropp* and *The Queen v. Higgins*—in one case the representatives of the party were rated, and in the other case the Court held that, if there was error in the rate, it was the subject-matter of an appeal, and not a question for this Court.

MONAHAN, C. J.

We are all of opinion that the collector had no right to make the seizure. In order to make the rate valid, the rate-book must in some way describe the occupier. "Tenants of the common" is an insufficient description.

PERRIN, J.

It would be much more convenient if a small sum was charged against each occupier.

Conviction quashed.

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- A



**BAIL.**

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*Semble*, that the source from which such family reputation is derived does

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not take away its admissibility as evidence, although it may weaken its force with the jury. *E. Betty v. Nail* 17

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### COSTS.

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1. Ejectment for non-payment of rent, under the statutes, does not lie upon a concurrent or reversionary lease. The proceedings in ejectment are substituted only for entry; and where a lessor hath no right of entry, his proper course to determine the estate for condition broken is to make a claim.

Where a Private Act of Parliament gave power to a tenant for life to make leases either concurrent or in possession, so as in every such lease there should be reserved a condition of re-entry:—*Held*, this should be construed *reddendo singula singulis*, and did not make such a condition in a concurrent lease granted under the power effectual, so as to give the lessor

a right of entry. *E. Herbert v. Madden* 28

2. In an ejectment on the title—*Held*, under the 85th section of the Common Law Procedure Amendment Act 1856, that the defendant may, by leave of the Court, plead the statutory and an equitable defence. *Q. B. Turner v. M'Auley* 245

3. In an ejectment on the title, the plaintiff relied on a conveyance made to him by the Commissioners of Incumbered Estates, of certain lands, including the lands sought to be recovered, which were described in the conveyance and a map annexed thereto. The defendant rested his defence on a lease (still subsisting) of the lands sought to be recovered, and made prior to the conveyance, but not referred to therein, the particulars of which lease had been set out by him pursuant to notice from the Commissioners, and were inserted in the rental of the lands sought to be sold, but were not comprised or set out in the rental of the lot purchased by the plaintiff; and also proved that subsequent to the sale to the plaintiff, and prior to the conveyance, a portion of the lands sold was taken from the plaintiff, and other lands were given to him in lieu thereof, which were taken out of lands remaining unsold, and the map attached to the conveyance differed accordingly from that of the rental of the lot purchased.—*Held* (reversing the judgment of the Queen's Bench), that such evidence was improperly admitted.—(*Dissentiente*, *LEFROY, C. J.*)

In his charge to the jury, the learned Judge told them that, although the premises sought to be recovered were within the ambit of the map traced upon the conveyance, and the defendant's lease was not mentioned or referred to in the conveyance, yet, if the premises sought to be recovered were demised by that lease, and that the plaintiff purchased subject to that lease, it would virtually be only a

purchase of the reversion expectant upon the lease, and then upon the evidence the Commissioners' conveyance would only operate to pass the reversion in fee expectant upon the lease, but would not entitle the plaintiff to recover possession during the lease.

*Held*, a misdirection, and that the conveyance by the Commissioners operated to pass the fee-simple in the lands discharged of the lease, and conferred an indefeasible title upon the purchaser.—(*LEFROY, C. J., dissentiente.*) *Ex. Cham. Brrington v. Rorke* 279

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SEIZURE IN EXECUTION.

1. H. B., in September 1811, contracted a regular marriage with Miss H., during the lifetime of a Mrs. C., with whom the plaintiff alleged that H. B. had previously contracted an irregular Scotch marriage. Lady O., a member of H. B.'s family, was produced by plaintiff, to prove that before she heard of the regular marriage of H. B., she had heard from members of the family of his Scotch marriage; that evidence was objected to by de-

## EVIDENCE.

pendant as hearsay evidence, and not falling within any of the exceptions to the rule excluding such evidence.—*Held* (Pigot, C. B., *dissentiente*), that the evidence was properly rejected.

A letter of the 26th of September 1816, from S. B., a brother of H. B., to P. B., the father of H. B., in which S. B. mentioned a statement made to him by H. B., on the subject of the Scotch marriage, was offered in evidence, and rejected.—*Held*, that the letter was properly rejected, as not being within the class of declarations which, in matters of pedigree, are admissible; also as a declaration clearly made *post litem motam*.

A letter of Mrs. C., to a third person, of the 26th of March 1811, with the Moffatt post-mark thereon, was offered in evidence by the defendant, as evidence that she was then at Moffatt; and the admission of it as evidence of that fact was objected to by the plaintiff; but the defendant insisted that it was evidence generally, and the Judge ruled that it was admissible. It had appeared from the evidence of a Scotch advocate, previously to this letter being offered in evidence, that the fact of an irregular marriage depended on all the circumstances of the case, antecedent, accompanying and subsequent. After that letter had been received, the defendant gave evidence of the alleged Scotch marriage having occurred in April 1811. Another letter of Mrs. C. was also read in evidence, subject to objection, dated the 13th of May 1811; both letters were signed as Mrs. C.—*Held*, that the letter of May was admissible, as showing that, after the alleged marriage, she still called herself Mrs. C.

*Held also* (Pigot, C. B., *dissentiente*), that the letter of March 1811 was admissible for the same purpose, at the period of the trial at which it was offered, namely, before the defendant gave evidence of the alleged Scotch marriage having occurred in April.

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*Held also* (Pigot, C. B., *dissentiente*), that the exception objecting to the admission of both letters was too wide, as one of the letters was admissible. *E. Butler v. Mountgarret* 77

2. By a conveyance from the Commissioners for the Sale of Incumbered Estates, certain lands were conveyed to A. P. and M. P. his wife, "to hold the same unto the said A. P. and M. P. for ever, as joint tenants thereof, subject to the tenancies referred to in the schedule hereunto annexed." In the schedule the tenants were described as "Andrew Kelly & Co., tenants from year to year." A. P. and M. P. executed a power of attorney, authorising their agent to collect and receive rents, and to distrain and bring actions for same; and also authorising him to take proceedings for the enforcing covenants in leases, and, for that purpose, to sign and serve notices to quit. The agent signed a number of blank notices to quit, and gave them to his clerk B., who brought them to the lands, filled them up there, and gave them to a bailiff to serve. The bailiff served the notices upon the tenants, but was only acquainted personally with Kelly. An ejectment in the names of A. P. and M. P. was then brought against Kelly and the other defendants. At the trial, B. the clerk swore that he had received instructions from A. P. himself.—*Held*, that the effect of the conveyance was to grant to the husband and wife an estate by entireties.

*Held also*, that the husband had such a legal estate in the lands as enabled him to serve notices to quit, and to determine tenancies, without the concurrence of his wife.

*Held also*, that the power of attorney did not give the agent a general authority to serve notices to quit.

*Held also*, that the statement of B. was evidence of a parol authority from A. P. to serve notices to quit,

and that therefore the notice ought to have been received in evidence.

*Held also*, that service of a notice to quit upon one of several joint tenants is *prima facie* evidence of service upon them all. *C. P. Pollok v. Kelly*

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## EVIDENCE OF QUALIFICATION.

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## EXECUTOR.

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## FALSE IMPRISONMENT.

A, being confined in the Marshalsea, under a civil-bill decree, at the suit of B, a petition was presented by him for his discharge as an insolvent debtor; and, before adjudication on that petition, an order of the Insolvent Court was served on the insolvent, requiring him to file a schedule, which he disobeyed; and an order was then obtained, on the application of C, as attorney of B, for his committal for this contempt, and a warrant was thereupon granted by the Insolvent Court; and, by virtue of this warrant, A was committed to the Richmond Bridewell, where he remained until discharged by order of this Court, such committal having been illegal. In an action for false imprisonment, brought by A against B and C, the above facts were proved; and also a bill of costs by C, charging costs for obtaining this warrant. Evidence was also tendered of conversations between plaintiff and one of the defendants, which took

## FRANCHISE.

place two months prior to the committal, to show malice.—*Held*, that this evidence was inadmissible.

*Held also*, that even though the order of the Insolvent Court, directing the committal of the plaintiff, was illegal, yet, being an order of a competent jurisdiction, the defendants could not be held responsible for acting under it, in an action of trespass. *Q. B. Murray v. Byrne*

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## FAMILY REPUTATION.

See CIVIL-BILL EJECTMENT.

## FATALITY.

See PROCEDURE ACT.

## FIAT.

See PRACTICE, 21.

## FRANCHISE.

1. A claimant to register was returned on the list of the Clerk of the Peace as a person entitled to vote for the county of C., in respect of premises rated at £12. 5s.; he was objected to, and he then produced the list of registered voters for the year, wherein his name appeared as a voter in respect of the same qualification as on the previous list; he also produced the copy of the register of voters transmitted by the Clerk of the Peace to the clerk of the union, and by him returned to the Clerk of the Peace, upon which his name appeared unobjected to.—*Held*, that these documents, taken together, established a *prima facie* case in favour of the claimant; and not being displaced, he was entitled to be on the register. *Ex. Ch. Byrne's case*

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2. A claimant to be inserted upon the list of voters for the borough of Tralee, as occupier of two houses in succession, had been rated for the last rate made in the borough on the 4th of March 1856, for one of the houses, but not for the other, for which another person had been rated.—*Held*, that it was not necessary that

## FRANCHISE.

the claimant should have been rated for both houses, and no rate having been struck in the interval of succession, he was entitled to be registered, as being in successive occupation of qualified premises. Ex. Ch. *Morphy's case* 418

3. Four brothers were rated in respect of premises in the borough of Tralee, at the annual value of £55. Under their father's will, the premises were devised to one of the brothers, not the claimant, subject to charges for the other three. After his death, the four brothers continued business under the old style of their father's firm, and all, except one, occupied the premises, and were supported out of the profits of the firm. There were no articles of partnership, nor did it appear that the claimant was entitled to a share in the profits.—*Held*, that the claimant did not jointly occupy in the character of tenant or owner, and was not entitled to be registered as a joint occupier of the premises. Ex. Ch. *Reardon's case* 420

4. Where several persons occupy premises jointly, some of whom were rated to the poor, others not, and the value of the premises, if divided by the number of persons rated, would give the statutable qualification to vote, but, if divided by the number of occupiers, would be too small.—*Held*, that none of the occupiers was entitled to be registered. Ex. Ch. *M'Dowell's case* 434

## FREEHOLD FRANCHISE.

- A claimant served notice to register as a £50 freeholder, without further specification of his title or estate.—*Held*, that the description was sufficient. Ex. Ch. *Fitzgerald's case* 425

## FREEMAN.

- A, being bound apprentice by indenture to a freeman for seven years, during the term, by consent of the master, went into the employment of a person

## INCUMBERED ESTATES, &c. 607

not a freeman, and continued there until the expiration of his apprenticeship. There was no transfer of the indentures.—*Held*, that the claimant was not entitled to be on the list of freemen. Ex. Ch. *Lucas' case* 429

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*See STAYING EXECUTION.*

## HONORARY FREEMAN, SON OF.

The son of an honorary freeman, who was created such since the 30th of March 1831, born after his father's admission as such, and duly admitted in respect of birth, is entitled to be placed on the list of freemen, inasmuch as he is an ordinary freeman, and therefore, under the 13 & 14 *Vic.*, c. 9, entitled to vote. Ex. Ch. *Orpen's case* 432

## HUSBAND AND WIFE.

*See EVIDENCE*, 2.

A husband may bring an action of ejectment for non-payment of rent in his own name alone, where the lands had been the fee-simple property of the wife before coverture, and the rent had accrued on a demise made by the wife's ancestor. The wife is not, in such case, a necessary party. C. P. *Holmes v. Hennegan* 365

## INCOMPLETE VERDICT.

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## 608 INCUMBERED ESTATES.

### INCUMBERED ESTATES.

*See* LANDLORD AND TENANT.

### INDICTMENT.

Where, on an indictment charging the prisoner with stealing, and also receiving goods, knowing them to be stolen, the jury found a general verdict of guilty, not specifying on which count the verdict was found; the Court set aside this verdict, for uncertainty, and awarded a *venire de novo*.  
Q. B. *The Queen v. Evans* 500

### INDORSEMENT ON PLAINT.

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### ISSUE, FORM OF.

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### JOINT OCCUPATION.

*See* FRANCHISE, 3, 4.

### JOINT-STOCK COMPANIES ACT.

In a *scire facias* against a shareholder of a Joint-stock Banking Company, upon a judgment obtained against the public officer, under the 6 G. 4, c. 42,

## JUDGMENT.

it was stated that there were no effects or property of the Company, same being under the administration of the Court of Chancery. The defendant pleaded that the Bank was one within the Bankers Act (33 G. 2, c. 14), and, being in debt, had stopped payment, and that thereupon its property and effects became liable to be administered, and were under the administration of Chancery (but without stating the nature of the administration proceeding).

On demurrer to this defence—*Held*, that in the absence of such a statement, it could not be assumed that the property was being administered under the Bankers Act, so as to raise the question whether that Act was repealed by the 6 G. 4, c. 42; and that (assuming both those Acts to be in force), the liability of the Company's property to be applied in a Court of Equity, under the Bankers Act, for the benefit of the creditors, afforded no defence to a proceeding at Law under the 6 G. 4, c. 42, as it would not have done to a proceeding at Common Law before that Act passed.

*Semble*—That even if it appeared that a decree in Chancery had been made for the administration of the Company's property, under the Bankers Act, such a decree could not be pleaded as a defence at Law; but that the defendant's proper course would be to apply to Chancery for an injunction to restrain the proceedings at Law.

*Quere*—Whether the 6 G. 4, c. 42, had the effect of repealing the Bankers' Act? E. *Carroll v. Kennedy* 6

### JOINT TENANCY.

*See* EVIDENCE, 2.

LEASE.

### JUDGMENT.

*See* JOINT-STOCK COMPANIES ACT.  
PRACTICE, 21.  
RECORD.

A judgment was entered on the 11th of May 1855, in this Court, on a bond,

## JURISDICTION.

dated the 31st of October 1854, the warrant, executed coterminously therewith, being filed in the Court of Exchequer; and a charging order, founded on the judgment, was obtained on the 11th of June 1855.—

*Held*, on an application by the assignee of the defendant, an insolvent debtor, to set said proceedings aside, that though such judgment was void as against the assignee, because it was not entered within twenty-one days after the date of the bond and warrant, and was entered in a Court different from that in which the warrant had been filed, and because the defeasance was not written on the same paper as the warrant of attorney, yet the Court would not set aside such proceedings on account of matter *ex post facto*, such as an insolvency occurring after the judgment and order were obtained. Q. B. *Doolan v. Reynolds* 233

## JURISDICTION.

*See* DECREE OF INFERIOR COURT OF RECORD.

PRACTICE, 5, 19.

## JURY, DISCHARGE OF.

*See* LIBEL, 4.

## JUSTIFICATION.

*See* LIBEL, 2.

## LACHES.

*See* PROCEDURE ACT.

## LANDLORD AND TENANT.

*See* EJECTMENT, 1.

## TRESPASS.

A rental, published under an order of the Commissioners of the Incumbered Estates Court, stated that the lands intended to be sold were subject to a lease, at a certain rent, which rent had been abated; and the schedule to the conveyance executed by the Commissioners adopted this rental.—*Held*, in an action by the purchaser under this conveyance, claiming the full

## LEASE.

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rent, that this rental, and proof of payment of the abated rent for 18 years prior to the sale, was no answer to the action.—[PERRIN, J., *dissentiente*.] Q. B. *Booth v. Daly* 460

## LARCENY.

*See* INDICTMENT.

## LEASE.

*See* EJECTMENT, 1.

By lease, bearing date the 11th of November 1818, certain premises were demised to A and B as joint tenants, for a term of thirty-one years. A became a party to this lease as security for B, who cultivated the lands until 1831, when a deed of partition was executed, and A gave his moiety to the eldest son of B, and from that period A exercised no control over the land; the rent having been paid by B's family up to the expiration of the lease in 1849. B died in 1848, and his family remained in occupation for three years and a-half after his death. Receipts for the rent were passed in A's name up to 1848, when a sum of £65 was paid by A. In 1851, a writ issued against A, for arrear of this rent. To this action, A took defence, denying his liability; and subsequently, by agreement, a sum was paid on account. A was not then in occupation, and directed the agent of the landlord to take possession.—*Held*, that no action was maintainable against the representatives of A, for occupation of the premises after the expiration of the lease, and that on this evidence the Judge ought not to direct a verdict for the plaintiff, and that it was no misdirection, leaving a question to the jury whether A had assented to such overholding.—[CRAMPTON, J., *dissentiente*.]

Where, after defence filed, the plaintiff dies, the action may be continued by his personal representative by entry of a suggestion; liberty to file such suggestion is granted on an *ex parte* application. Q. B. *Mahon v. Lewis* 475



## LEGAL ESTATE.

See WILL, 2.

## LIABILITY OF TENANT.

See LANDLORD AND TENANT.

## LIBEL.

See SLANDER.

1. To an action for libel, charging the defendant with printing and publishing a libel, of and concerning the plaintiff, and of and concerning him in his occupation and business, the defendant pleaded that he did not print or publish, or cause to be printed or published, the libel, of and concerning the plaintiff, or of and concerning him in his trade and business. —*Held*, on appeal, that the proper issue on such pleadings was, whether the defendant printed or published the libel, of or concerning the plaintiff in his trade and business?

*Held also*, that a party appealing from the issue settled by a Judge is not entitled to a postponement of the trial, or a stay of execution on verdict and judgment, when the Judge at the trial approves of the issues.

*Held also*, that on an appeal motion, affidavits subsequently filed cannot be used; and, *per* MOORE, J.—Every material fact in a plaint may be traversed without an affidavit, but it must be done by separate defences.

Q. B. *Boshell v. Anderson* 1

2. A plea of justification in libel need not necessarily meet the exact words of the libel; but may adopt the sense of the inuendo, and justify that. Therefore, where a count in libel complained that the defendant had published of the plaintiff the following words:—"How he next appeared in Buncrana as curate and tutor; how he gave out, while there, that he was a graduate of Oxford; a *Captain of Dragoons*, &c. (meaning that the plaintiff had been guilty of wilful falsehood and misrepresentation of facts); and the defendant pleaded that the plaintiff had falsely represented

## MALICE.

that he was a graduate of Oxford, and had been a *Surgeon in the Navy*," &c., the plea was, on demurrer, *Held* to be good. C. P. *O'Connor v. Wallen* 378

3. A *bona fide* communication, made in reply to a *bona fide* inquiry coming from a person interested in the subject-matter of the inquiry, when the communication is made by a person who, from his position, is likely to possess information on the subject, will be privileged, even where no moral obligation to make the communication exists. C. P. *Owens v. Roberts* 386
4. To an action of libel, defendant pleaded that the publication was not libellous; that the words were not used in the defamatory sense imputed, and a justification. On the close of the plaintiff's case, and after the defendant's Counsel had addressed the jury, but before the examination of his witnesses, the jury intimated that they were of opinion that the publication was not a libel, and that the inuendoes were not proved. The learned Judge allowed them to find for the defendant, without giving them any direction on the plea of justification, and the jury were discharged without any finding thereupon.—*Held*, that this was a mis-trial, as the plaintiff was entitled to a finding on that defence. Q. B. *Pilson v. Johnson* 505

## LIBERTY TO PROCEED AFTER YEAR AND DAY.

See PRACTICE, 14.

## LIMITATIONS, STATUTE OF.

See RECEIVER.

RECORD.

WILL, 2.

## LIS MOTA.

See EVIDENCE, 1.

## MALICE.

See PRACTICE, 1.

SLANDER.

## MARKING JUDGMENT.

### MARKING JUDGMENT.

A plaintiff having sued a Railway Company for breach of duty as carriers, served the writ of summons and plaint on the secretary of the Company, and, without having given notice of action in the *Dublin Gazette*, and one of the local newspapers, marked judgment for want of a defence within the statutable period.—*Held*, that such proceeding was irregular, and that the 135th section of the Companies Clauses Act, which declares service on the secretary of a Company to be good, is impliedly repealed by the Procedure Amendment Act 1853; and therefore, before marking judgment against a Railway Company, it is necessary to give notice in the *Gazette* and one of the local newspapers of the issuing of the writ of summons and plaint. *Q. B. Moore v. Belfast and Ballymena Railway Co.* 441

### MARRIAGE, VALIDITY OF.

Where a marriage contract was entered into between two members of the Established Church of E. and I., *per verba de præsenti*, in the presence and with the intervention of a clergyman in holy orders, of that communion, and followed by consummation:—*Held* (in accordance with *The Queen v. Millis*, 11 Cl. & F. 572), that such was a valid marriage, and that the issue thereof were legitimate.

Where, prior to the late Marriage Act (7 & 8 Vic., c. 81), a clergyman of the United Church of England and Ireland, being in holy orders, performed a ceremony of marriage between himself and one I. F., she being a Protestant, by reading in a room in a private house the form of solemnization of matrimony as set forth in the Book of Common Prayer; no witness, or any other person, being present at the performance of such ceremony, but such performance having been seen, but not heard, by a third party, from an adjoining yard, without the knowledge of the parties themselves, and such ceremony being followed

## OCCUPATION.

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by consummation:—*Held*, *per* LEFROY, C.J., PIGOT, C.B., CRAMPTON, PERRIN, MOORE, JJ., and RICHARDS, B., a sufficient presence and intervention of a clergyman in holy orders, so as to validate the marriage, and legitimatise the issue of such marriage.—(*Dissentientibus*, MONAHAN, C. J., JACKSON, BALL and KEOGH, JJ., and GREENE, B.) *Ex. Ch. Beamish v. Beamish* 142

### MERITS.

*See* AFFIDAVIT.

### MISDESCRIPTION.

*See* POOR-RATE.

### MOTION.

*See* PRACTICE, 3, 7, 8, 14, 19, 20.

### NECESSARIES.

*See* PRACTICE, 6.

### NEW TRIAL.

*See* PRACTICE, 6, 11.

### NONSUIT, ORDER FOR.

*See* PROCEDURE ACT.

### NOTICE.

*See* PRACTICE, 14, 19.

REFERENCE TO MASTER TO ASCERTAIN DAMAGES.

### NOTICE OF CLAIM.

*See* FREEHOLD FRANCHISE.

### NOTICE OF OBJECTION, SUFFICIENCY OF.

*See* COUNTY REGISTRY.

A notice of objection to the name of a claimant followed the form given in schedule B, No. 15, to 13 & 14 Vic., c. 69, describing the objector to be "on the list of voters for the borough of Sligo."—*Held*, sufficient, although the register of voters in the borough of Sligo is made up from three separate lists of names. *Ex. Ch. Olphert's case* 422

### NOTICE TO QUIT.

*See* EVIDENCE, 2.

### OCCUPATION.

*See* LEASE.

## 612 OVER-MARKING.

### OVER-MARKING EXECUTION.

*See* SEIZURE IN EXECUTION.

### PAROL AVERMENT.

*See* RECORD.

### PAROL RETAINER.

*See* ATTORNEY.

### PARTIAL REPORT.

*See* SLANDER.

### PAYMENT, STOPPAGE OF.

*See* JOINT-STOCK COMPANIES ACT.

### PEDIGREE, MATTERS OF.

*See* EVIDENCE, 1.

### PENALTIES.

*See* POOR-LAW ACT.

### PHYSICIAN.

*See* AFFIDAVIT.

### PLAINTIFF IN EJECTMENT.

*See* PRACTICE, 18, 19.

### PLEADING.

*See* JOINT-STOCK COMPANIES ACT.

PRACTICE, 1, 6, 10, 11, 15, 17.

RECORD.

TRESPASS.

1. Where the plaintiff stated in his plaint a certain agreement, and the defence contained allegations inconsistent with that agreement, but did not traverse it, and issues having been taken on those allegations, the defendant offered in evidence another and a different agreement, to substantiate his defence:—*Held*, that (under the 68th section of the Common Law Procedure Act) he had admitted the agreement in the plaint mentioned, by not traversing it; and that the agreement sought to be relied on by him could not be admitted in evidence to controvert the former. *E. Jefferyes v. Lysaght* 41
2. In an action for goods bargained and sold, and sold and delivered, a special defence, stating that the contract was made on certain conditions not complied with, is unnecessary, as that de-

## PLEADING.

fence may be given in evidence under a mere traverse or denial of the contract.

*Semble*—however, that such a special plea is not improper, and will not be set aside as embarrassing.

The 56th section of the Common Law Procedure Act, which requires the special matter of the defence to be expressly pleaded, refers to the pleading of new facts, or facts extrinsic to the plaintiff's case. *E. Mosely v. M'Mullen* 69

3. Demurrer.—In an action for work and labour, the plaint did not aver that the work was done at the request of the defendant. Defendant demurred on that ground.—*Held*, that the objection was fatal, notwithstanding that the Common Law Procedure Act abolishes the formalities of pleading. *E. Corah v. Young* 138
4. In an action for goods sold and delivered, the defendant pleaded that no goods were bargained, sold or delivered, as in the summons and plaint alleged.—*Held* (*per* MONAHAN, C. J., and BALL, J.), that under this plea the defendant was at liberty to prove that the sale had been by sample, and that the goods delivered were not of the same kind as the sample.  
*Held* (*per* TORRENS and JACKSON, JJ.), that such matter of defence should have been specially pleaded. *C. P. Boake v. M'Cracken* 259
5. To an action for seizing the plaintiff's goods, &c., the defendant pleaded that he did not take or carry away the plaintiff's goods; that the goods, &c., in the summons and plaint mentioned, were not the goods, &c., of the plaintiff, but the goods of a third party; and that the defendant seized them by virtue of a writ of *fi. fa.* directed against that party.—*Held*, that the defence was not double, so as to require the leave of the Court to plead several matters, under the provisions of the 45th General Order. *C. P. Atkinson v. Baker* 272

PLEADINGS, ABSTRACT OF.

See PRACTICE, 10.

POOR-LAW ACT.

In an action for penalties, brought under the 1 & 2 Vic., c. 56, s. 93 (Irish Poor-law Act), against a guardian of the Clifden union, for supplying certain provisions to that union, the venue was laid in the county of the city of Dublin. The defendant pleaded that in such actions the venue was local, under the 2nd section of the 10 and 11 Car. 1, c. 11, and that the plaintiff had not made an affidavit that the offences were committed in the county where the venue was laid, as required by the 3rd section of that statute.—*Held*, on demurrer, that the 1st, 2nd and 3rd sections of the 10 and 11 Car. 1, c. 11, apply only to cases where the party has an option of suing in an Inferior or in a Superior Court, and do not apply to cases where the action is required to be brought in a Superior Court, as is the case in actions for penalties under the 1 & 2 Vic., c. 56, s. 93. C. P. *Banks v. Coney* 584

POOR-RATE.

In a warrant authorising a poor-rate collector to levy rates, the occupiers were described as "tenants of commons."—*Held*, that this was an insufficient description of the occupiers, and did not authorise a distress of cattle grazing on the common. Cr. Ap. *The Queen v. Boyle and others* 598

POSTEA, AMENDMENT OF.

See PRACTICE, 20.

POWER OF SALE.

See WILL, 2.

PRACTICE.

See ATTORNEY.

CONDITIONAL ORDER.

LEASE.

LIBEL.

MARKING JUDGMENT.

1. To an action for maliciously and falsely, and without reasonable or probable cause, filing an affidavit of

debt, and falsely, maliciously and without reasonable or probable cause serving a notice thereof under the Bankrupt Act, a defence traversing the allegations of the cause of action, in the words of the summons and plaint, was held good. E. *Darcey v. Cahill* 121

2. The costs of an affidavit of debt and summons in bankruptcy, ordered by the Commissioners (pursuant to the 12 & 13 Vic., c. 107, s. 18), to abide the event of an action pending at Law, may be recovered under that section by the plaintiff, if successful, as costs in the cause, although he may not have obtained judgment in the action. E. *Phillips v. Hughes* 122

3. A party cannot renew a motion which has been once disposed of; and therefore where a defendant applied to set aside a summons and plaint for irregularity, and the motion was refused because the original had not been filed:—*Held*, that he could not renew the motion after the filing of the original writ.

*Semble*—The omission of the indorsement, required by the 7th General Order of January 1854, is a fatal irregularity. E. *O'Brien v. Taylor* 124

4. The plaintiff is entitled to require an affidavit of merits when applied to for security for costs; and if the defendant, when so required, fail to furnish the affidavit, and applies to the Court, he will have to pay the costs of the motion. E. *Coveney v. Gibson* 130

5. Vacation is to be included in the computation of the time within which a rule for costs, in case of not proceeding to trial, is to be entered; and when that time has elapsed, the Court has no authority to allow the rule to be entered. E. *McKinney v. Reynolds* 133

6. An action upon an I O U and goods sold. Defence, infancy. Replication, that the I O U was passed for necessities, and also that the goods sold

were necessaries. *Issues*—First, whether the I O U was passed for necessaries?—Secondly, whether the goods sold were necessaries? At the trial, the Judge permitted the plaintiff to amend the plaint, by increasing the amount claimed for goods sold, so as to include the amount of the I O U, and to amend the particulars by specifying the necessaries for which the I O U was passed. On a motion for a conditional order to set aside the verdict because of the amendment—*Held*, that the amendment was proper, under the Common Law Procedure Act, as it raised the substantial question in controversy; and a conditional order refused. *E. Gordon v. Hasard* 135

7. Where, pending a motion to set aside a defence for irregularity, a plea of confession is filed, the plaintiff is entitled, notwithstanding such plea of confession, to move his motion, otherwise he will be disentitled to the costs incurred by him in such a proceeding. *C. P. Good v. Allen* 244

8. Where the copy of the summons and plaint served omitted to state the venue, which was properly set forth in the original as filed, of which latter fact the defendant's attorney was aware, the Court refused to allow the costs of a motion to set aside the copy and service. *C. P. Harnett v. Ahern* 270

9. Under the provisions of section 138 of the Common Law Procedure Act, it should appear by the affidavit which is required to obtain a side-bar order that the party sought to be charged in execution is already in the prison of the Court. *C. P. McDonnell v. Anderson* 271

10. The 102nd section of the Common Law Procedure Act authorises a Judge, at the settlement of issues, also to regulate the form of the abstract of the pleadings; and such is the proper mode of proceeding where the abstract is irregular or defective. *C. P. Bergin v. McDowell* 274

11. Where the case made by the plaintiff at the trial was a surprise on the defendants, the Court granted a new trial, though no objection to the Judge's charge had been taken by the defendants at the trial.

Where, from a manifest error in one of the pleas, it was impossible to try the entire question between the parties, the Court allowed the plea to be amended at the trial, on the condition of the plaintiff being allowed to tender an issue on the defence as amended. *C. P. Douglas v. Ewing* 359

12. The party ultimately successful is entitled to the costs of a previous abortive trial of the same action. *C. P. Byrne v. Elliott* 381

13. Where a demurrer had been filed, and the paper books had not been lodged until after the expiration of the six days allowed by the 50th General Order, but the usual Side-bar rule to set down the case for argument was subsequently entered, the Court overruled a preliminary objection to the hearing of the demurrer, on account of non-compliance with the Order, and *Held* that effect should be given to the Side-bar rule until set aside. *C. P. Cusack v. McCabe* 383

14. The rule for liberty to proceed in an action, after a year and a day, must, under the 178th General Order, be served on the opposite party personally. The notice of motion necessary, under the same Rule, after the lapse of two years, need only be served on the attorney of the opposite party. *C. P. Killinger v. Butler* 384

15. In an action by indorsee against acceptor of a bill of exchange, a plea that the indorsee had not given full value for the bill was set aside by the Court as being frivolous and sham, and the plaintiff allowed to mark judgment. *C. P. Loughran v. Hill* 385

16. Substitution of service may be had upon an English Company, by service of their agent residing in Ireland,

## PRACTICE.

provided that any portion of the cause of action has arisen in Ireland. C. P. *Kisbey v. Chester & Holyhead Railway Co.* 393

17. A defence to an ejectment for non-payment of rent, stating that the defendant did not hold the premises as tenant thereof to the plaintiff, raises an immaterial issue, and will be set aside. C. P. *Bell v. Beatty* 399

18. A party named in an ejectment as a plaintiff, without his consent, will be struck out of the record, notwithstanding an indemnity offered, unless it be shown he was a trustee for the other plaintiff. Q. B. *Montgomery v. Montgomery* 522

19. In an ejectment, the Court has no authority to permit a party's name to be used as plaintiff without his sanction, unless it is shown by the other plaintiffs that the party so named is in fact a trustee for them.

In every case moved in Chamber, and directed to stand over for the Full Court, a notice of renewing the motion must be served. Q. B. *Sullivan v. Sullivan* 523

20. This Court will not entertain a motion to amend a *postea*; such application is properly moveable before the Judge who tried the case. Q. B. *Lew v. Russell* 536

21. Where a *fiat* had been obtained, and an arrest made thereunder at the suit of the plaintiff, and a bail bond executed, on which bail was never perfected, and the plaintiff in the writ obtained judgment in the action, and issued a *ca. sa.* thereon, but failed to arrest the defendant—*Held*, by obtaining such judgment, the plaintiff did not thereby lose his right to take an assignment of the bail bond, and proceed against the bail. Q. B. *Hardiman v. Fottrell* 573

## PRESENTMENT.

Where a presentment has been passed by a grand jury, and flated by a Judge, this Court will not grant a

## PROCEDURE ACT. 615

*certiorari* to quash this presentment, on the ground of informality in the obtaining of the presentment.

As a general rule, the Court will not go behind a presentment. Q. B. *Ex parte Henn* 239

## PRINCIPAL AND SURETY.

*See* SEIZURE IN EXECUTION.

## PRIVILEGED COMMUNICATION.

*See* LIBEL, 3.

SLANDER.

## PROBABLE CAUSE, WANT OF.

*See* PRACTICE, 1.

## PROCEEDINGS, JUDICIAL, PUBLICATION OF.

*See* SLANDER.

## PROCEEDINGS, SETTING ASIDE.

*See* JUDGMENT.

## PROCEDURE ACT.

*See* ATTACHMENT.

CONDITIONAL ORDER.

EJECTMENT, 2.

LEASE.

LIBEL, 1.

MARKING JUDGMENT.

PLEADING, 1, 2, 3.

PRACTICE, 5, 9, 10.

RECORD.

REFERENCE TO MASTER TO ASCERTAIN DAMAGES.

Where, pursuant to the 106th section of the Common Law Procedure Act, the defendant had entered a rule that the plaintiff should proceed to trial at Assizes next after the expiration of the twenty days from the service of such rule, and the plaintiff not complying with such rule, defendant entered the peremptory order for nonsuit and his costs; on an application to set aside or vary these rules, without any grounds stated for such re-scission, save the *laches* of the clerk of the attorney: *Held*, that nothing but a fatality can prevent the strict operation of the rules; and that the defendant, having acted regularly, was

entitled to their protection. Q. B.  
*Dowell v. Hussey* 280

#### PROPERTY IN REGISTERED TREES.

See WILL, CONSTRUCTION OF, 1.

#### PUBLIC COMPANY.

See JOINT-STOCK COMPANIES ACT.

#### PUBLIC PROCEEDINGS.

See SLANDER.

#### RAILWAY COMPANY.

See MARKING JUDGMENT.

#### RAILWAY COMPANY, NON-EXEMPTION OF.

See TITHE RENTCHARGE.

#### RECEIVER.

R. B. died in 1819, seised in fee of C. East and of other lands, and also having a life interest in the lands of C. West, the reversion of which belonged to L.—R. B. by his will devised all his real estates to the widow of his brother P., for her life, with a power of appointment in fee to whichever of her two sons G. E. B. or S. B. she pleased. Upon the death of R. B., G. E. B., disputing the title of his mother, entered upon all the lands, including C. West, adversely, as regards the latter, to the title of L., and continued in undisturbed possession until 1825. From 1825 until 1841, the lands of C. West were under receivers, appointed by the Court of Chancery, at the instance of the judgment creditors of R. B. and others. The judgments against R. B. had been revived against the heir and terretenants of R. B.; and G. E. B. was served as terretenant. From 1840 until his death in 1844, G. E. B. was in the actual enjoyment of the rents and profits of C. West, and, upon his death, his son and heir-at-law P. B. succeeded him in the possession, until he was evicted thereout, as well as out of the other devised estates, in 1850, by the present defendant, claiming as the eldest son and

heir-at-law of S. B., the appointee of his mother under the will of R. B. A cross-ejectment was brought in 1857 by P. B., and a mortgagee of G. E. B., who had not been a party to the former suit, upon the ground that R. B. had gained an estate in fee, by an uninterrupted possession of twenty years, within the meaning of the 3 & 4 W. 4, c. 27, ss. 2, 3 and 34. At the trial, the Judge told the jury in his charge that the possession of the lands of C. West, by receivers, appointed at the instance of the creditors of R. B., was such an interruption of the twenty years' possession as would prevent the statute from transferring to G. E. B. and his heirs an estate in fee-simple. The jury found that R. B. had only a life interest in C. West, but that G. E. B. and the plaintiff P. B. had not an uninterrupted possession for twenty years.—*Held*, that the possession of the receiver for the above purpose did not so far interfere with the possession of G. E. B., as to prevent the Statute of Limitations operating in his favour.  
*C. P. Groom v. Blake* 400

#### RECORD,

To a writ of revivor of a judgment of 1819, revived in 1842, the defendant pleaded that there were two judgments of the same date, for the same amount and between the same parties, remaining unsatisfied, and that neither of said judgments had been revived, it not appearing by the record of the judgment of revivor upon which of the judgments the Court had awarded execution; and secondly, defendant pleaded that plaintiff had not sued forth the writ of revivor within twenty years after the recovery of said judgments, or either of them.—*Held*, that the first defence was bad, because it was a parol averment to contravene matter of record.

*Held*, that the second defence was also bad, because the 20th section of the Common Law Procedure Act (1853), which says no action shall be

## REFERENCE, &c.

brought on a judgment, but within twenty years after the cause of such action or recovery of such judgment, only applies to actions begun by summons and plaint, and not to writs of revivor or proceedings by suggestion. *Q. B. Johnston v. Bell* 526

### REFERENCE TO MASTER TO ASCERTAIN DAMAGES.

An application for a reference to the Master to ascertain the amount of final judgment, under Common Law Procedure Act 1856, must be made on notice, or a conditional order only will be granted. *E. Honohan v. Ahern* 141

### RENT.

*See ATTACHMENT.*

### RENTAL.

*See LANDLORD AND TENANT.*

### RENT, ABATEMENT OF.

*See LANDLORD AND TENANT.*

### REPORT, WHEN ACTIONABLE.

*See SLANDER.*

### REPUTATION, FAMILY.

*See CIVIL-BILL EJECTMENT.*

### REQUEST, NECESSITY OF.

*See PLEADING, 3.*

### RETAINER.

*See ATTORNEY.*

### REVERSION, NECESSARY TO SUSTAIN EJECTMENT.

*See EJECTMENT, 1.*

### RIGHT OF ENTRY.

*See EJECTMENT, 1.*

### RULES.

*See PRACTICE, 5, 14.*

### RULE TO PROCEED TO TRIAL.

*See PROCEDURE ACT.*

### SALE BY SAMPLE.

*See PLEADING, 4.*

## SEIZURE, &c. 617

### SCIRE FACIAS.

*See JOINT-STOCK COMPANIES ACT.*

### SCOTCH MARRIAGE.

*See EVIDENCE, 1.*

### SECURITY FOR COSTS.

*See PRACTICE, 4.*

### SEIZURE IN EXECUTION.

Where a creditor, having seized the goods of a principal debtor in execution, afterwards caused a return of *nulla bona* to be made on the writ of execution, and forbore to sell the goods, though called on by the surety so to do, and then issued a *ca. sa.* against the person of the surety, marked for the full sum due, without deducting therefrom the value of the goods so seized:—*Held*, that this amounted to a voluntary abandonment of the seizure; and that, as the seizure and subsequent abandonment of the goods of the principal operated in Equity as a discharge *pro tanto* of the surety (who was entitled to call upon the creditor to proceed and sell the goods, and to give him credit for the amount realised by such sale), the value of those goods was an equitable deduction, to which the plaintiff should be entitled under the statute of 6 *Anne*, c. 7.

*Held also*, that an action at Common Law lies for maliciously, and without probable cause, overmarking the writ of execution under which the debtor is arrested, as the statute of *Anne* provides no specific remedy for that case, but only for the case of the omission to deliver a proper certificate, or for overcharging the debtor in that certificate.

Plaintiff, having deposed in evidence that he wrote a letter about his affairs to the defendant, calling on him to sell the goods so seized, and that he, or somebody for him, posted it; and evidence having been given that the defendant had held a conversation with a third person, in which he stated that he had been so called upon, and during which



conversation he held a letter in his hand, which he did not read, but which he said he had received on the subject:—*Held*, sufficient ground to admit secondary evidence of the letter written by plaintiff (a notice to produce having been served).

The decree in a Chancery petition matter, in which the plaintiff was petitioner, and the defendant was a respondent as public officer of a Bank, and in which matter the amount of the value of the goods seized by defendant, and the plaintiff's right to that amount, as an equitable deduction, had been determined, being offered in evidence, was objected to, as obtained against the defendant *in autre droit*.—*Held*, that such proceeding was not *res inter alios acta*, but was admissible against defendant, as he had, *prima facie*, a complete control over the suit as a party thereto (no evidence of limited control having been given).

*Held also*, that this decree, although made subsequently to the arrest complained of, was evidence at least to prove the value of the goods, which had been ascertained thereby; and that, if admissible for any purpose, the exception taken to its reception, being general, should be overruled.

*Semble also*, that the decree would be admissible as the decision of a Court of competent jurisdiction, that a right to an equitable deduction had existed at the time the execution issued.

*Semble*.—A party maliciously arresting another for more than is due cannot be held to have probable cause, by reason of his mere belief that he is warranted by law in so doing.

The relinquishing of the execution against the goods of the principal, and the issuing of execution against the person of the surety, with the motive of serving the principal by injuring the surety, is evidence for the jury on the question of malice.

## SLANDER.

Letters written by the defendant's solicitor, subsequently to the arrest of the plaintiff, with reference thereto, were *Held* properly receivable as evidence of malice in the arrest; as the *animus* of the defendant is to be inferred by the jury *ex antecedentibus et consequentibus*.

An incomplete finding of the jury on one of the issues in the case was *Held* immaterial, as the admissions on the record and the findings on the other issues showed a sufficient case of action, although, if the former had stood alone, there should have been a *venire de novo*. *E. Spencer v. Thompson* 537

## SERVICE.

*See* CIVIL-BILL EJECTMENT.  
MARKING JUDGMENT.  
PRACTICE, 8, 16.

## SETTING ASIDE DEFENCE.

*See* PLEADING, 1.

## SETTING ASIDE PROCEEDINGS.

*See* JUDGMENT.

## SEVERAL ISSUES.

*See* LIBEL, 4.

## SIDE-BAR RULE.

*See* PRACTICE, 9.

## SLANDER.

*See* LIBEL, 1.

Action for a libel published by the defendant in a newspaper.

The defendant pleaded that he was a guardian of the poor of a certain union, and at a meeting of the board of guardians of that union a discussion arose in reference to the plaintiff, and that speeches were made by several of the guardians, including the defendant, and by the plaintiff on his own behalf, and that the defendant spoke in discharge of a public duty, without malice, &c.; also, that in order to assist the newspaper reporter, who attended for the purpose of reporting the proceedings, to publish

# SOURCE, &c.

# STATUTES, &c.

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a correct account of them, he handed to him a correct report of his own speech, and that the proprietor of said newspaper published, without any communication with the defendant or his consent, a portion of said speech only.—*Held*, as to the first defence, that the defendant was not privileged, as it appeared on the defence itself that the report of the proceedings was not a fair one; the speeches of the other guardians, or of the plaintiff himself, not having been given.

*Held also*, that if the privileged occasion failed, the denial of malice did not constitute a defence.

*Held*, as to the second defence, that the defendant was responsible for the fair publication of the proceedings, when he gave a report of his own speech for publication. *E. Pierce v. Ellis* 55

## SOURCE FROM WHICH EVIDENCE IS DERIVED.

See CIVIL-BILL EJECTMENT.

## STATUTE.

See EJECTMENT, 1.

## STATUTORY AND EQUITABLE DEFENCE.

See EJECTMENT, 3.

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4 <i>G.</i> 1, c. 5	32
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19 & 20 Vic., c. 102, s. 99. Procedure Act		141
19 & 20 Vic., c. 102, s. 50		509

## STAYING EXECUTION.

The Court will not stay execution on a *habere* obtained in an action of ejectment for non-payment of rent, unless all rent due at the time of the issuing of the *habere* be paid to the plaintiff. *Q. B. Tottenham v. Goff* 237

## STAYING PROCEEDINGS.

An application under the provisions of section 22 of the Chancery Regulation Act should be made before a single Judge, and not before the Full Court. *C. P. Fitzgerald v. Marsh* 277

## SPOPPAGE OF PAYMENT.

*See JOINT-STOCK COMPANIES ACT.*

## STRIKING OUT PARTIES.

*See PRACTICE*, 18, 19.

## SUBSTITUTION OF SERVICE.

*See PRACTICE*, 16.

## SUCCESSIVE OCCUPATION.

*See FRANCHISE*, 2.

## TRESPASS.

## SUGGESTION.

*See LEASE.*

## SUMMONS AND PLAINT.

*See PRACTICE*, 3, 8.

## SURPRISE.

*See PRACTICE*, 11.

## TIMBER ACTS, CONSTRUCTION OF.

*See WILL, CONSTRUCTION OF*, 1.

## TIME.

*See PRACTICE*, 5.

## TITHE RENTCHARGE.

An applotment was made under the Tithe Composition Act, on certain lands, of which Lord H. was entitled to the first estate of inheritance. The defendants, for the purposes of their Railway, took a conveyance of the estate from Lord H. The tithe, pursuant to the 1 & 2 Vic., c. 109, had been reduced one-fourth.—*Held*, that the rentcharge, imposed by 1 & 2 Vic., being substituted in lieu of the charge formerly created on the lands, remained a charge thereon, and that the lands being occupied as a Railway made no ground of exemption. *Q. B. Hertford v. Ulster Railway Co.* 511

## TRAVERSE.

*See LIBEL*, 1.

*PLEADING*, 1.

## TRESPASS.

To an action of trespass, for breaking and entering the close of the plaintiff, and seizing and taking and carrying away and converting the goods and chattels of the plaintiff, the defendant pleaded a justification;—because of an arrear of rent being due by the plaintiff to the defendant as his landlord, he, the defendant, entered and distrained the goods and chattels as

and for a distress for the rent due, "according to the form of the statute in such case made and provided;" *quæ sunt eadem, &c.*—*Held*, on demurrer to this defence, *per* LEFROY, C. J., and PERRIN, J., that such general pleading was good; and *per* CRAMPTON and MOORE, JJ., that the requirements of the statute 9 & 10 Vic., c. 111, should have been specifically set out in the defence. Q. B. *Spratt v. Murphy* 489

TRIAL, WITNESS UNABLE TO ATTEND.

*See* AFFIDAVIT.

VACATION.

*See* PRACTICE, 5.

VENUE.

*See* POOR-LAW ACT.

VERDICT, GENERAL.

*See* INDICTMENT.

VERBAL AUTHORITY.

*See* ATTORNEY.

VOTER.

*See* COUNTY REGISTRY.

WARRANT.

*See* POOR-RATE.

WILL, CONSTRUCTION OF.

1. A, by his will, dated the 21st of November 1832, reciting that he was seised in fee-simple of certain estates, and also of the reversion in fee in certain settled estates, and that he was desirous of settling and disposing of his unsettled and other estates, "devised to trustees all the lands of which he was seised in fee-simple, and also his reversion in fee of his settled estates, and all his estate and interest in said estates respectively, upon certain trusts therein named; and by

a codicil, reciting that he had purchased certain freeholds, and had converted leaseholds into freeholds, he specifically devised the same, and such as he should thereafter purchase, upon the same trusts. At the time of making this will and codicil, he was seised under a lease of an estate for lives.—*Held*, that that leasehold interest did not pass to the trustees under the will and codicil, but descended upon the heir-at-law of the testator.

A, in his lifetime, planted timber trees on said leasehold estate, and duly registered the same, and died without having felled the timber, and was succeeded by B, his heir-at-law, the surviving life in the lease. After the death of B, and within twelve months after his decease, his personal representatives cut the timber.

*Held*, that at Common Law, the timber was part of the inheritance until severed; but that when severed, it became a mere chattel; and that under the Timber Acts, the tenant not having felled said trees during the existence of the lease, they remained part of the inheritance, and descended with the land. Q. B. *Alexander v. Godley* 445

2. [A testator by his will appoints executors, and empowers them "to act as such, and that they will dispose and manage the effects in manner and form following:—First, I recommend my lawful debts to be paid, as my lawful debts to be recovered." He then devised his real estates among his sons in certain portions, each son to become entitled to possession upon his marriage, subject to a proportionate share of the debts and charges affecting the real estate.—*Held*, that the executors took the legal estate only during the interval between the death of the testator and the happening of the event upon which each son was to become entitled to possession; and that the words of the will did not give the executors a

power to sell the lands for the payment of the testator's debts.

*Held also*, that the heir-at-law of one of the devisees, who had died intestate, had a sufficient legal estate to maintain an action of ejectment on the title, although there had been no reconveyance by the executors.

*Held also*, that continuous possession for twenty years, by a trespasser and those deriving under him, bars the right of the true owner. *C. P. Keefe v. Kirby and wife* 591

WITNESS UNABLE TO  
ATTEND.

*See AFFIDAVIT.*

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